FILE COPY

Office - Supreme Court, U. S.
DEC 14
CHARLES ELMORE CROPLEY

United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

Nos. 142-146

UNITED STATES, Petitioner,

vs.

HOWARD C. MYERS

—

UNITED STATES, Petitioner,

vs.

JOHN H. ARBLE

—

UNITED STATES, Petitioner,

vs.

CHARLES C. MARTIN

—

UNITED STATES, Petitioner,

vs.

WALTER O. PLITZ

—

UNITED STATES, Petitioner,

vs.

GEORGE H. SPITZ

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENTS

ROBERT M. DRYSDALE,
Attorney for Respondents,
1538 Dime Building,
Detroit, Michigan

Interstate Brief & Record Co., Case Bldg., 457 Fort St. W., Detroit, Mich.

SUBJECT INDEX

	Page
Opinions Below	2
Questions Presented	2
Statutes and Regulations Involved	2
Statement of Facts	3
Summary of the Argument	5
Argument	13
I. Jurisdiction and Liability of Government	13
II. Statutory Provisions and Regulations	18
Doctrine of Adopted Statutes	21
Grant of Additional Pay Created, Distinct from Day Pay	21
III. Legislative History and Cases Construing the Pertinent Statute	22
Act of March 2, 1799	22
Act of March 3, 1873	23
Certain Practices Regarding Unlading of Passengers and Baggage	24
Act of February 13, 1911	25
Status of Wm. H. Bond	26
Act of February 7, 1920	28
Hearings, 66th Congress (1920)	32
Hearings, 67th Congress (1922 Tariff Act)	36
1922 Tariff Act	38
Acts of March 4, 1923 and May 29, 1928	40
Cases Construing the Pertinent Statute	40
71st Congress (1930 Tariff Act)	43
75th Congress (Customs Administrative Act of 1938)	46
Public Interest Proviso	49
Administrative Practices and Legislative Approval	52

Page

IV. Meaning of "Overtime Services" 53

As Defined in Section 5 53

"Overtime" as Contended by Petitioner is Impossible Under Pertinent Statute 53

Universal Acceptance of Extra Pay for Sunday and Holiday Work 55

The Word "Overtime" Used in Substitution for word "Night" in Old Section 5 56

Definition in International Ry. Co. v. Davidson 58

Definition in the Ferguson Case (supra) 59

Meaning of Word "Remain" 60

Results of Petitioner's Construction 62

Results of Respondent's Construction .. 63

Regarding the Amounts Due 64

Applicable Cases on Pay of Government Employees 66

V. Working Hour Proviso 66

Effect of Provisos 70

Meaning as Controlled by the Davidson Case 71

VI. Petitioner's Claim of Set-off 73

VII. Special Consideration of Ambassador Bridge 75

Conclusion 77

Appendix 79

Statutory Provisions 79

Regulations 81

1915 Regulations 82

Act of February 13, 1911 83

Prior Enactments 85

Old and New Sections 5 88

Page

67th Congress—Amendment Proposed..... 90

70th Congress—Amendment Proposed..... 90

Requested Findings on Effect of Deficiency Appropriation Act of 1936..... 91

H. R. 6738 as Introduced in 75th Congress by the Treasury Department..... 93

Congressional Record Regarding Working Hour Proviso 94

Congressional Record — Intention to Increase Pay 99

INDEX TO AUTHORITIES CITED

Cases Cited:

Butler v. United States, 23 c. cls. 162..... 66

Cochnouer v. United States, 248 U. S. 405..... 25

Crain v. United States, 25 c. cls. 204..... 17

Crawford Statuory Construction, p. 29, Sec. 17.. 73

Crooks v. Harrelson, 282 U. S. 55..... 66

Ferguson v. Port Huron & Sarnia Ferry Co., 13 Fed. (2d) 489.....8, 31, 41, 56

Geddes v. United States, 38 c. cls. 428, 442..... 17

Glavey v. U. S., 182 U. S. 595..... 18

Gulf Transport Co. v. United States, 43 c. cls. 183 17

International Railway Co. v. Davidson, 257 U. S. 506, pp. 512, 513.....28, 33, 35, 40

Interstate Railway Co. v. Mass., 207 U. S. 79 at page 84 30

In re Heath, 144 U. S. 92..... 71

Kendall v. U. S., 12 Pet. (37 U. S.) 524, 526 headnote 71

Koshland v. Helvering, 298 (U. S.) 441, 446, 447.. 53

Latimer v. United States, 223 U. S. 501, 504..... 59

Page

Manhattan General Equipment Co. v. Comm. of Internal Revenue, 297 U. S. 129 on p. 134.... 72
Medbury v. U. S., 173 U. S. 492, 497..... 18
Mellon v. Minneapolis, St. Paul & S. S. M. Ry., 11 Fed. 2d 232.....8, 21, 33, 42
Miller v. United States, 294 U. S. 435, pp. 439-40.. 72
Moore v. United States, 4 c. cls. 141, 165..... 66
Panama Railroad Co. v. Johnson, 264 U. S. 375, 391, 392 71
Panama Refining Co. v. Ryan, 293 U. S. 338 on p. 529 73
Port Huron & Sarnia Ferry Co. v. Lawson, 292 Fed. 216 ..... 8, 41
Sausser v. United States, 9 c. cls. 338, 341..... 17
Schecter v. U. S., 295 U. S. 405 at p. 541..... 73
Sessions v. United States, 145 U. S. 29, 42..... 59
State v. Larson (N. J.), 160 Atl. 556, p. 557..... 73
Sutherland v. Miller, 79 W. Va. 796, at p. 803, 91 S. E. 993 at p. 996..... 73
Treat v. White, 181 U. S. 264, 268..... 66
United States v. Andrews, 240 U. S. 90..... 18
United States v. Averill, 4 Utah 527..... 66
United States v. Bassett, 2 Story U. S. 389, 402... 15, 66
United States v. Beaver Run Coal Co., 99 Fed. (2d) 610, 613..... 34
United States v. Clough, 55 Fed. 373..... 66
United States v. Coltier, 3 Blatch. 333..... 66
United States v. Dickson, 15 Peters (U. S.) 141, 161 .....53, 70
United States v. Hvoslef, 237 U. S. 1, 10..... 18
United States v. La Vranca, 222 U. S. 568..... 73
United States v. Trans. Missouri Freight Assn., 166 U. S. 290, 318..... 52
United States v. Morse, 3 Story 87, Fed. Cases No. 15,820 66

Page

United States v. Scheveport Grain Co., 287 U. S. 77, 82 73

United States v. Standard Brewery Co., 251 U. S. 210, 220 73

Upton v. United States, 19 c. cls. 46, 49 17

Acts of Congress:

Act of February 7, 1920, 41 Stat. 402; U. S. C. (1940) Title 19, Sec. 267 ..... 28, 82, 70, 88

~~Act of February 3, 1920 (41 Stat. 402; U. S. C. (1940), Title 19, Sec. 267) ..... 88~~

Act of February 13, 1911, Section 5 (36 Stat. 901) 2, 8, 14, 25, 35, 40, 71, 82, 83, 88

Act of March 2, 1799 (1 Stat. 665, 667) 6, 7, 22, 35, 39, 85

Act of March 3, 1873 (17 Stat. 579, R. S. 2871) ... 8, 14, 21, 23, 26, 60, 86

Act of March 3, 1917; C. 163, S. 1; 39 Stat. 1106 .. 14

Act of March 4, 1909 (c. 314, s. 2, 35 Stat. 1065) ... 25, 29

Act of March 4, 1923 (s. 6, 42 Stat. 1454, 19 U. S. C. 52) 16, 40, 54

Act of March 13, 1911 85

Act of April 29, 1864 29

Act of May 8, 1792 ..... 7, 51, 54

Act of May 29, 1928 ..... 9, 40, 54

Act of June 22, 1936 (49 Stat. 1636) 91, 92

Act of June 26, 1884 (23 Stat. 59 amending R. S. 2872) 25, 87

Act of June 30, 1906 (34 Stat. 633), Sec. 2871 (R. S.) 25, 87

Act of July 23, 1866 (14 Stat. 208) 24

Tariff Acts Cited:

	Page
1922 Tariff Act (42 Stat. 948, 954)	2, 6, 8, 15, 38, 40, 46
1930 Tariff Act (46 Stat. 708; 19 U. S. C. 1401, 1450, 1451	2, 8, 43, 44, 59, 70
Art. 1, Sect. 1 of Constitution of the United States	11
Article (b), 1937 Reg. (1462-3)	54

Miscellaneous:

Committee Hearings—	
66th Congress (1920)	26, 27, 28, 36, 62
67th Congress (1922)	26, 36, 38, 90
70th Congress	90
71st Congress (1930)	26, 43, 44
75th Congress (1938)	26, 46, 48, 49, 93
Congressional Record Vol. 59, part 2, 66 Cong., January 28, 1940, pp. 2171, 2172-2177	61, 94
Customs Regulations, 1937	81
Manual for the Guidance of the Outdoor Force of the Customs Service, 1920, on page 19	30
New Section 5 (1920)	10, 13, 21, 57, 80, 88
Lewis Sutherland, Stat. Const., 2nd Ed., S. 470, p. 880	51, 52
Lewis Sutherland Stat. Const., 2nd Ed., Vol. 2, p. 674	71
Sutherland Stat. Construction, 3d Ed., Vol. 2, p. 549	20, 71
Sub-committee of Committee on Ways and Means on H. R. 6577, October 11, 1929, p. 15	29, 32
Revised Statutes 1719; 49 Stat. 864	44
Revised Statutes, title XXXIV of	39
Tucker Act (28 U. S. C. 250 (1))	5
2 American Jurisprudence, Sect. 1, p. 12	76
19 U. S. C. 1401, 1450 to 1454	79

Page

59 Cong. Record, part 2, 66th Cong., p. 2171 31
81 Cong. Record 9392 77
1915 Regulations—
Article 1166 82
Article 1167 82

United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

Nos. 142-146

UNITED STATES, Petitioner,

vs.

HOWARD C. MYERS

—

UNITED STATES, Petitioner,

vs.

JOHN H. ARBLE

—

UNITED STATES, Petitioner,

vs.

CHARLES C. MARTIN

—

UNITED STATES, Petitioner,

vs.

WALTER O. PLITZ

—

UNITED STATES, Petitioner,

vs.

GEORGE H. SPITZ

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The first opinion in the Court of Claims is reported in 92 c. cls. 447, and ordered re-argued on Court's motion in 94 c. cls. 712. The last opinion is not yet officially reported.

QUESTIONS PRESENTED

The principal question presented is whether the night, Sunday and holiday services performed in these cases fall within the grant of additional pay for services performed for private interests outside the Customs House hours of a port when free customs service is available, although such services are performed within a given number of hours per week?

STATUTES AND REGULATIONS INVOLVED

Liability is predicated upon the administrative provisions of the 1922 Tariff Act (42 Stat. 948, 954) as re-enacted in the 1930 Tariff Act (46 Stat. 708; 19 USC 1401, 1450, 1451) and into which is incorporated by specific reference, Section 5 of the Act of February 13, 1911 (36 Stat. 901) as amended by Act of February 7, 1920 (41 Stat. 402, 19 USC 267), and which amendment is hereinafter referred to as the new Section 5.

The pertinents provisions of Sections 401, 450 and 451 of the Tariff Act of 1930 appear in App. 79. The pertinent provisions of the new Section 5 appear in App. 80, and also, at App. 88, where it is shown as it appeared

in the Act of February 13, 1911, *supra*, and also as amended by Act of February 7, 1920, *supra*.

STATEMENT OF FACTS

Respondents dispute the administrative practices as stated by petitioner. The principal controversy centers upon the reasons alleged for the payment of additional pay for Sunday and holiday services performed from the time of the enactment of the 1922 Tariff Act through the period involved in these suits. Petitioners claim such payment was made because work on those days was in excess of 44 or 48 hours per week (depending upon whether before or after effective date of "Saturday after holiday law"). Respondents contend that during the whole period from 1922 until the opening of the Ambassador Bridge in 1929, that Sunday and holiday pay was allowed because it came within the grant of additional pay provided by Congress for work on those days, and that any other reason for such payment would have been illegal and in violation of the statute and the regulations issued thereunder.

Respondents further claim that when the Ambassador Bridge was opened, additional pay was continued at certain facilities,[1] and discontinued at the remaining facilities,[2] under the illegal guise of paying the additional Sunday and holiday pay by "compensatory time off" during the week; that is, instead of requiring the em-

---

[1]The Railway ferries, i.e., Pere Marquette, Wabash, Grand Trunk and Michigan Central (Passenger Division).

[2]Ambassador Bridge, Detroit & Windsor Ferry, Walkerville Ferry and Michigan Central (Freight Division, but not Passenger Division). Additional pay was never given at Ambassador Bridge or Detroit & Canada Tunnel, when later opened.

ployees to work seven days and pay them the additional pay granted for Sunday and holiday work, the additional pay was refused because compensation therefor was otherwise granted by giving the employee such "compensatory time off."

The only dispute as to the adequacy of the base pay or the additional pay, is that respondents were refused the additional pay granted by Congress for the work herein involved and which was performed at night and on Sundays and holidays.

An error has been made in that part of Finding No. 6 by the Court of Claims, which states that throughout the period involved in respondents' claims additional pay was first collected by the collectors of customs and then remitted by him to the Inspectors by check on the fund so collected. When the 1936 Deficiency Appropriation Act became effective, the practice in Detroit was changed immediately, and thereafter payment to the Inspectors was made by the United States direct to the Inspectors before collection of the amounts from the carriers.

This error appeared in the findings of the Commissioner, to which respondents filed objections, and to cover which point they filed with the Court a request for a special finding, copies of which objections and request for special finding appear in App. 91, 92. The error in not having that finding before this Court, accompanied by the testimony in the record, is the fault of counsel, who overlooked that particular point. If it becomes material and necessary we request permission to have the record supplemented so as to bring before the Court the undisputed evidence on that point. Such practice was conceded by petitioner in the Court below, and there never was any dispute regarding the same.

SUMMARY OF ARGUMENT

I.

JURISDICTION

The petition sets forth a cause of action within the provisions of the Tucker Act (28 U.S.C. 250 (1)). The action is based on an act of Congress and the regulations issued thereunder, and also upon a contract which is either express or implied in fact.

Under the provisions of the pertinent act, the night, Sunday and holiday hours of respondents were requisitioned by their employer, the Government, for services to be rendered for the benefit of private interests, with a fixed rate of compensation provided therefor. The statute required payment to be made to respondents by the United States through its agent, the collector. Under the provisions of the statute, a cause of action arises under an act of Congress. Respondents are not concerned with the other provisions of that statute which require the collector to collect the additional pay from the carriers. Government assumed that duty through its agent, the collector, and safeguarded itself by directing the collector to exact a bond "conditioned to indemnify the United States for any loss or liability which might occur or be occasioned by reason of the granting of such special license. * * *"

Also the action is founded upon contract. The terms of the contract are fixed by the statute and regulations issued thereunder which provide that the customs employees perform certain services. The statute fixes their rate of pay, and when the inspectors perform those services, the statute raises an implied promise to pay the amount so fixed.

The point suggested by petitioner, that there could be no contract implied in fact in these cases because of the circumstances under which the services were performed, is not well-founded and has been adjudicated by the decisions of this Court. Under those decisions, it is unlawful and against public policy for any government official, including the President of the United States, to interfere in any way with the compensation provided by Congress for government employees, and any such interference, and subsequent acceptance of the situation by the employees, does not prevent the contract implied in fact from arising, by performance of the service.

II.

STATUTORY PROVISIONS AND REGULATIONS

The statute and regulations issued thereunder create a grant of additional pay to the field force of customs employees for working at night or on Sunday or on a holiday. The history of that grant springs from act of March 2, 1799 *(infra)*, and by the 1922 Tariff Act *(supra)* the grant was broadened to include all the services here involved. In the grant, night services and Sunday and holiday services are placed in the same category. That grant is not here conditioned, nor has it ever been conditioned upon performance of other hours of service. Government created this grant as a means of saving it from the obligation of an admittedly necessary and substantial increase in pay to customs employees.

Under the terms of this grant, the services of those employees could be, and were, requisitioned for night, Sunday and holiday hours which were outside of the weekday, daylight hours of the port, when free customs service was available. Service during those unusual hours

was considered to be for the benefit of carriers desiring such services at those hours. The additional pay was made a charge against the carriers receiving the benefit of the services, payable to the United States, so that the increase in pay was thus accomplished by the requisitioning of the night, Sunday and holiday hours of customs employees for the benefit of carriers, and requiring the carriers to pay the additional compensation and to save the United States from the liability thereof.

III.

LEGISLATIVE HISTORY AND CASES CONSTRUING THE PERTINENT STATUTE

The history of pertinent legislation dates back to Act of May 8, 1792 *(infra)*, which act fixed the duties and authority of the Secretary of the Treasury with respect to the customs service. By Act of March 2, 1799 *(infra)*, unlading of vessels was prohibited at night or on Sundays or the Fourth of July, except under special license which was issued by the collector, which, in practice, was used when necessary to avert damage to cargo. The services of customs inspectors could not be requisitioned at night or on Sundays or the Fourth of July for the unlading of cargo from vessels, and when the special license to unlade was issued, it resulted in the inspectors bargaining with the master of the vessel as to the rate of pay for the night, Sunday and Fourth of July services. In those days, services in connection with unlading of vessels constituted practically all the services performed by the inspectors, so that practically all the night, Sunday and Fourth of July hours of inspectors were then protected against invasion. The additional pay so earned by customs inspectors subsequently became an important item in their total pay.

By Act of March 3, 1873 *(infra)*, Government took over the matter of regulating the additional pay, by making provision for a special license to unlade at night, and requiring the collector, under regulations to be issued by the Secretary of the Treasury, to fix a reasonable rate of pay for customs inspectors for night services. Government took over the collection of that pay for the benefit of the inspectors by requiring the collector to make collection thereof from the master or owner of the vessel, and to pay the same to the inspectors. The act was, in effect, a grant of additional pay for night services in connection with unlading of vessels.

By act of February 13, 1911 *(infra)* that grant of additional pay was broadened to include night, Sunday and holiday services and additional employees were covered by the grant. By act of February 20, 1920 (new Section 5 *supra*) the grant was broadened to include additional employees, and the rate of pay increased, the admitted purpose of the increase then being to provide a substantial increase in the pay of customs employees.

By the Tariff Act of 1922, the grant was broadened to include all the services here performed and the provisions of that act were reenacted into 1930 Tariff Act, upon which these suits are based.

The present statute has been construed by the Courts in the cases of *Port Huron and Sarnia Ferry Company v. Lawson*, 292 Fed. 216; *Ferguson v. Port Huron & Sarnia Ferry Co.*, 13 Fed. (2) 489; and *Mellon v. Minneapolis, St. Paul & S. S. M. Ry.*, 11 Fed. 2d, 332. Those cases upheld the grant of additional pay to all the facilities here involved except the Ambassador Bridge and Detroit and Canada Tunnel, which were not then in operation. The application of the act as to those facilities, except the bridge and tunnel, is conceded by petitioner.

The proceedings before congressional committees in the 67th and 71st Congress, cited by petitioner, were in connection with desperate efforts by carriers to relieve themselves from the obligations of the additional pay. The proceedings in 75th Congress were the results of an effort of the Treasury Department to make statutory the practices of the Bureau of Customs which, since enaction of the Tariff Act of 1922 had violated the law and regulation of the Secretary. All of those demands were refused by Congress. The information given to those committees by persons not even members of Congress, constitutes one of the petitioner's main defenses, although such information was informative only as to the intricacies of the practices then in use by the Bureau of Customs. Those proceedings have little or no probative value in construing the pertinent statute.

IV.

MEANING OF "OVERTIME SERVICES"

The word "overtime" was first used in this legislation in the new Section 5 in 1920. It was not there used in any sense as requiring weekday service to be performed as a condition for the earning of night, Sunday or holiday pay. At the time of that enactment and until act of May 29, 1928 *(infra)*, the statute and the pertinent regulations issued thereunder specifically required the field force of customs employees to work 365 days per year, and if they failed to work on Sundays or holidays, those days were charged against them.

Also, by statute, there was no limitation to the number of hours per day to be worked. The regulations specified certain official daylight hours of service, but specifically reserved the right to extend those hours as the needs of the service might require, and without extra compen-

sation. In practice, customs employees were required to work long hours,—sometimes through the night after having worked all day, and then through the succeeding day. There was no limitation to the right of Government to requisition those hours. The only protection afforded the employees was the right of additional pay when they were assigned to duty at night or on Sunday or on a holiday. Under such a statute, "overtime" as contended by petitioner, is impossible.

Furthermore, the new Section 5, by its own terms, defined what was to be deemed overtime, and the definition given is services performed after 5 p.m. and before 8 a.m. and on Sundays or holidays.

The words "overtime services" in the new Section 5 (1920) were used in substitution for the words "night services." In drafting the language of the new Section 5, it became necessary to use words in place of "night services" as appeared in old Section 5, which would describe Sunday and holiday services, as well as night services, and so the words "overtime services" were used in the new Section 5 in substitution for the words "night services" in the old Section 5 and were so used to denote services performed between 5 p.m. and 8 a.m. and on holidays and Sundays.

V.

WORKING HOUR PROVISO, SO-CALLED

The working hour proviso, so-called, authorizes the Collector of a port to regulate the official hours of a port, which were then fixed for the nine hour period between 8 a.m. and 5 p.m., so as to conform with the customary working hours of employees in other industries whose

services are necessary in connection with the lading or unlading, such as the longshoremen at New Orleans, who worked from 7 a.m. to 4 p.m.

Petitioners' construction of that proviso is excluded by its very terms, which prohibit the collector from altering or affecting in any manner the overtime pay fixed in the statute, or the length of a working day for custom employees. When enacted, that proviso applied only to vessels and other conveyances carrying cargo and arriving at a port, and did not not apply to border facilities here involved.

The authority claimed by petitioners under that statute makes it unconstitutional in derrogation of Art. 1, Sect. 1 of the Constitution of the United States, which provides that all legislative power granted to the Federal Government shall be vested in Congress.

VI.

PETITIONER'S CLAIM OF SET-OFF

Petitioner claims the right to charge respondents for the hours not served by them during the time when they were performing the night, Sunday and holiday services for which additional pay is sought. The amount of the charge is computed on the basis of dividing the annual base pay of $2100 by 360. Respondents become entitled to their annual pay by qualifying as customs inspectors and performing the duties assigned to them. Their right to the annual pay does not depend upon the number of days worked so long as they serve as directed by their superiors in office. If the assignments to duty are for work at night or on Sundays or holidays, they earn the additional pay granted by Congress. That pay, by statute, and by regulation, is to be in addition to the annual pay.

VII.

SPECIAL CONSIDERATION OF AMBASSADOR BRIDGE AND DETROIT AND CANADA TUNNEL

These facilities fall within the definition of vehicle in the Tariff Act which includes every description of carriage or other contrivance used or capable of being used as a means of transportation on land. A bridge over a river, or a tunnel under a river, certainly are means of transportation. They both accomplish the same purpose as a ferry. Respondents concede that the ferries come within the scope of the pertinent statute. To exclude the bridge or tunnel from the operation of the statute produces an absurd result, and one which tends to defeat the purpose of the act, which was to increase the pay of customs employees.

ARGUMENT

I.

JURISDICTION AND LIABILITY OF GOVERNMENT

Section 450 of the Tariff Act describes certain merchandise, passengers and baggage which may be admitted into the United States at night or on a Sunday or a holiday, upon certain conditions therein named. Section 451 of the act provides for the requisitioning of the services of customs employees in connection with such unlading, and grants to them the right to receive night, Sunday and holiday pay for those services at the rate fixed by Section 5. By the terms of Section 5, the collector is directed to collect the additional pay from the carriers and

> "* * * pay the same to the several customs officers and employees entitled thereto, * * *"

Those provisions vest in the employees the right to receive the additional pay therein described, and that right is not conditioned upon the collector performing his duties for his principal, the Government. Nothing appears in that statute restricting the right of the officers to receive their compensation.

The United States assumed the burden and responsibility of making collection from the agencies of transportation receiving the benefit of those services. Those provisions merely provide the method for the agent of the United States, the collector, to carry out his duties. The employees have nothing whatever to do with those duties. They must serve where and when directed by their superiors (1937 reg. Art. 1339(b), App. 88), and the collection of the charges is entirely out of their control.

There can be no contractual relations between the inspectors and the transportation companies. The inspectors must needs look only to their employer for pay, and they

have no right of action against anyone except the United States. The acts of Congress forbid a government employee from receiving pay for his services from a private source.[1] Customs officials were especially forbidden to receive such payment.[2]

By Act of March 3, 1873 (1 Stat. 665; R. S. 2871) when Congress made the first grant of pay for night services, it acknowledged the liability of the United States to its employees, whose services were then permitted to be requisitioned, by requiring the collector to exact a bond, the only condition of which was

> "To indemnify and save the collector harmless from any and all loss and *liabilities* which may occur or be occasioned by the granting of such special license." (Italics ours.)

The principal liability, if not the only one, covered by that bond was the liability for the additional night pay that would accrue to the inspectors. No such bond had been exacted before, and of course its principal purpose was to protect the United States against loss or *liability* by reason of its assuming the collection of those funds which would accrue to it by reason of the requisitioning of the services of its employees for the benefit of private interests.

When in 1911 the grant of night pay was broadened to include Sunday and holiday pay, Section 2 of Act of February 13, 1911 (36 Stat. 899) changed the condition of that bond to read as follows:

> "To indemnify and save *the United States* harmless from any and all laws and liabilities which may occur or be occasioned by reason of the granting of such license or the issuing or granting of such per-

---

[1] Act of March 3, 1917; C. 163, S. 1; 39 Stat. 1106.

[2] R. S. 1719; 49 Stat. 864.

mit for immediate lading or unlading." (Italics ours.)

The 1922 Tariff Act changed the condition of the bond to read as follows:

> "To indemnify the United States for any loss or *liability* which might occur or be occasioned by reason of the granting of such special license and to pay the compensation and expenses of the customs officers and employees whose services are required in connection with such unlading at night or on Sunday or a holiday, * * *" (Italics ours.)

It is clear, that adding to the old condition of the bond, the new condition "to pay the compensation and expenses of the customs officers," was because of abundant and perhaps over-anxious caution on the part of the framers of that act. It in no way detracts from the liability acknowledged on the part of Government.

Petitioner argues that the inclusion of the new condition in the bond renders the old condition a surplusage, unless such condition is made to refer to a definite liability. Certainly before that enactment the word "liability" included the liability incurred to customs employees, and a different meaning cannot be given to that word simply by including other language with it.

That the new condition was added to the bond out of abundant caution is conclusive. The doctrine of "surplusage" is not here applicable.[1]

---

[1] See *U. S. v. Bassett*, 2 Story U. S. 389, 402, in which Justice Story pointed out the limitations of the "surplusage" doctrine, and that there are very few acts of legislation which do not fall within that predicament, and referred to Hamilton's citation to the Constitution of the United States which grants power to Congress "to lay and collect *taxes, duties, imposts* and *excises*." (Italics ours.) The Court held that the objection is not of itself just ground to alter the interpretation of any clause of an act, otherwise sensible and satisfactory, in order to escape the imputation of being unnecessary.

By deficiency appropriation Act of 1936 (Act June 22, 1936, c. 689, 49 Stat. 1636) Congress again recognized its responsibility and liability by authorizing payment of the additional compensation to the employees before receipt of the same from the carriers. Act of March 4, 1923 (s. 6, 42 Stat. 1454, 19 U. S. C. 52) directs that the compensation of all customs officers and employees shall be paid from the appropriation for the collection of the revenue from customs.

Petitioners cite at great length statements made in Congress and before committees, to the effect that it was contemplated that the carriers receiving the benefit of the services would pay therefor. That no doubt was a part of the plan. All that was necessary to carry out the plan was for the agents of the Government to enforce the provisions of the act. The Government chose to assume that duty, and the failure of its agent, the collector, to perform the duties of his principal, does not affect the liability of the United States to the customs employees.

Upon completion of the services they became a charge against the Government in favor of the employees, and at the same time became a charge against the carriers in favor of the United States. There is no occasion for the Government to take a loss, as the carriers are still liable and the statute of limitations does not run against the Government. Furthermore, there is no logical reason why these services should be performed for private interests at such unusual hours by the employees on demand of their employer, the Government, without the compensation fixed by statute. The charge should be collected from the carriers and not imposed upon the employees or Government.

When those services were performed by the employee they became entitled to the pay fixed by the act. A statute

which establishes a salary, or prescribes a rate of remuneration, expresses the intent of both parties, and becomes the contract between the Government and its employees. (*Upton v. United States,* 19 c. cls. 46, 49.)

Petitioner's construction of the statute would permit the collector to deprive another Government employee of the pay provided by Congress, by neglecting to comply with the law. Such a result is illegal. (*Geddes v. United States,* 38 c. cls. 428, 442.)

A court should not construe a contract so that one party will be wholly exempt from liability for his own acts.

Gulf Transport Co. v. United States, 43 c. cl. 183.

A case similar to those under consideration is that of

Sausser v. United States, 9 c. cls. 338, 341.

That case involved the embezzlement by a Collector of Internal Revenue of a deposit made by a contractor for a meter for use in distilleries under a statute requiring such meters to be installed and the money therefor deposited with the collector. The principles there cited by the Court of Claims are peculiarly applicable to these cases.

> "The Government chose to assume the responsibility of receiving these deposits, instead of allowing distillers to deal directly with the manufacturers of the meters. The Collector was an agent of the Government, which had a discretion in selecting him, and was not the agent of the distiller, who was compelled against his wishes to deal with him. The loss, therefore, must fall upon the principal of this agent, which is the Government."

To the same effect is

Crain v. United States, 25 c. cls. 204.

From a practical standpoint, this problem of who should pay for these services was solved by Congress in the only legal manner possible. The only manner by which the plan could be carried out legally was for the Government to assume the obligations of payment to customs employees, and to reimburse itself from the agencies of transportation involved, and this is just exactly what it did accomplish.

Payment necessarily had to be made by Government through the collector, to the inspectors, and the extra compensation had to come out of the funds of Government and Government became liable for the extra compensation. The failure by the Government to collect from the agencies of transportation did not relieve it from the liability for the payment of the extra compensation.

The petition states a cause of action founded on an Act of Congress and also a contract which is either express or implied in fact.[1]

II.

STATUTORY PROVISIONS AND REGULATIONS

Section 450 of the Tariff Act provides that no merchandise, baggage, or passengers arriving in the United States from any foreign port or place, shall be unladen from the carrying vessel or vehicle on Sunday, a holiday, or at night without a special license issued by the collector. In Section 401 "vehicle" is given a broad definition to include every description of carriage or other contrivance

---

[1] *Glavey v. U. S.*, 182 U. S. 595, and cases therein cited.
U. S. v. Andrews, 240 U. S. 90;
U. S. v. Hvoslef, 237 U. S. 1, 10;
Medbury v. U. S., 173 U. S. 492, 497.

used or capable of being used as a means of transportation on land.

No exceptions or limitations whatsoever are made to the necessity of such a special license. The collector is given no authority to make any determination as to whether or not such a special license is necessary. Nor is such authority vested in the Secretary of the Treasury. Assuming that the Ambassador Bridge and Detroit and Canada Tunnel fall within that definition of "vehicle" then all of the unlading involved in these suits should not have been permitted by the collector.

Petitioner admits that all such unlading was permitted to take place without such special license and relies on that fact as one of its defenses. Although there is no ambiguity in the plain language of the statute requiring such special license, nevertheless petitioner claims the right to resort to extrinsic aids in its construction and excuse compliance with the mandates of the statute by reading something into it not expressed therein.

Section 451 prohibits the granting of any such special license without the filing of a bond conditioned to indemnify the United States against loss or *liability* which might occur or be occasioned by reason of the granting of such special license and to pay the extra compensation of the customs employees who may be assigned to duty in connection with any such unlading at night or on Sunday or a holiday, in accordance with the provisions of Section 5. Section 452 of the act extends the foregoing provisions to lading of any merchandise or baggage for transportation under bond, or for the exportation with the benefit of drawback. Section 453 of the act provides drastic penalties for lading or unlading of merchandise or baggage without the special license. Section 454 provides

drastic penalties for unlading of passengers without such a special license.

The penalties of both sections are directed to the master of any such vessel or the person in charge of any such vehicle, and every person who knowingly is concerned or who aids therein, or in removing or otherwise securing such merchandise or baggage, or in unlading of passengers. It is in these sections that the substantive rights of customs employees to receive extra compensation is created. Note that the remuneration mentioned is described as compensation for night, Sunday and holiday services. The word "overtime" is not used in these sections.

Section 451 requires payment for such night, Sunday or holiday services to be made in accordance with the provisions of Section 5. If there were any conflict between the provisions of the Tariff Act and those of Section 5, the provisions of the Tariff Act would control, because they were enacted subsequent to the enactment of Section 5 and are paramount.

The applicable rule of construction was stated by this Court in *Interstate Railway Co. v. Mass.* 207 U. S. 79, at page 84, as follows:

> "If the document was identified it would not matter what its own nature or effect might be, as the force given to it by reference and incorporation would be derived wholly from the charter."

When a statute is incorporated into a later statute by reference, it is only the appropriate parts of the adopted statute that are given effect. The province of the adopted statute is to carry out the purposes and provisions of the adopting statute. (*Sutherland Stat. Construction* 3d Ed. Vol. 2, p. 549.) However, there is no conflict between the provisions of Section 5 and those of the Tariff Act. The

rights conferred by Section 5 are restated with additional emphasis and particularity in the Tariff Act.

The province of the new Section 5 is simply to fix the rate to be paid, and to adopt the procedure necessary to accomplish the purposes specified in the Tariff Act (*Mellon v. Minn. St. Paul & S. S. M. Ry.*, 11 Fed. (2d) 332, 334). In that case the Court stated:

> "The reference to Section 5 contained in Section 451 relates merely to the manner in which the additional pay shall be computed, and by whom it shall be paid. It in no respect limits the scope of 'vehicle' as used in the present Act to that of 'conveyance' as used in the former Act."

Following the mandate of the provisions of the new Section 5, the Secretary of the Treasury issued suitable regulations providing for the payment of the extra compensation for which this statute provided, and fixed the rates as specified in the statute. These regulations appear in T. D. 38290 issued under date of February 21, 1920, and have been in effect ever since that date.

Respondents contend that this statute is a continuation of the plan adopted by Act of March 3, 1873 (*infra*), of granting to customs employees separate and distinct items of pay. One is for day work during the customs house hours of a port which are performed primarily for benefit of Government and when free customs service is available. The other is pay for working at night and on Sundays and holidays in connection with certain designated services, the cost of which is to be reimbursed to Government by the agencies of transportation receiving the benefit of the services. The two items of pay are separate and distinct, and neither is dependent on the other, except that the rate of one is based upon the rate of the other. They are as though two separate offices were created with a rate of pay fixed for each office.

III.

LEGISLATIVE HISTORY AND CASES CONSTRUING THE STATUTE

We herewith submit a brief history of pertinent legislation.

Act of March 2, 1799 (1 Stat. 665, 667)

Pertinent provisions of the above act appear at App. 85, 86.

That act prohibited unlading of goods, wares and merchandise from vessels, from a foreign port, at night, or on Sunday or the Fourth of July, except under special license, which was issued only for the purpose of averting damage to cargo. Special provisions were made for unlading in cases of distress. The services of customs inspectors could not be requisitioned for work between the setting and rising of the sun, or on Sundays or on the Fourth of July. Those provisions related only to unlading cargo and not to passengers and baggage. However, in those days the unlading of cargo constituted practically all of the work of customs employees, so that those provisions affected practically all of their working hours. There was little passenger traffic in those days and no revenue to be protected at the Mexican and Canadian borders.

Because of those provisions, the matter of additional pay for customs inspectors for unlading at night, on Sundays and the Fourth of July, was left to negotiation between the master of the vessel and the inspector because of the fact that the law did not permit the requisitioning of the services of the inspectors during those hours.

The right of customs employees to additional pay for night, Sunday and holiday services granted by that act

has never been impaired, but on the contrary the grant was protected by making the rate of pay uniform and controlled by Government and increased from time to time and extended to additional employees and facilities. If petitioners definition of overtime is given effect it would be the first and only time that the grant would have been curtailed. By that act, the day pay of customs employees was fixed on a per diem basis at not more than $2.00 "for days actually worked in aid of the customs" and they remained on a per diem basis until Act of May 29, 1928, (§ 865, 31, 45 Stat. 955).

Act of March 3, 1873 (17 Stat. 579, R. S. 2871)

By the above act, Government placed the item of additional pay on a better basis by terminating the fixing of the rate by negotiation, and directing the collector, under regulations to be issued by the Secretary of the Treasury, to fix a uniform and reasonable rate of *compensation for night services* of inspectors and to collect the same from the master, or owner, of the vessel and pay it to the employees entitled thereto.

The act required a special permit to unlade to be obtained from the collector who was directed to exact a bond conditioned to save the collector harmless from all *liabilities* arising because of the issuing of the special license, thus acknowledging the liability of Government. The act related only to night services in connection with unlading cargo from steamships and did not affect work in connection with unlading of passengers and their baggage. It was a grant of additional pay to customs employees, separate from their day pay and not conditioned in any way on other hours of work.

Under that act, if two inspectors worked side by side at night to unlade a vessel, one examining cargo and the other

examining passengers and their baggage, one would receive additional pay and the other would not, thus illustrating that it was the intention of Congress to grant additional pay for certain night services which it described with particularity and not for some other kind of service which it failed to describe, such as overtime services, as contended by petitioner.

At that time the day pay which the inspectors received from Government was fixed at $4.00 per day. It had been increased to $3.00 per day by Act of April 26, 1816 (3 Stat., 306) and by Act of April 20, 1864 (13 Stat., 51), the Secretary of the Treasury had authorized an increase of $1.00, and that discretion was exercised. The increase was effective only until July 1, 1865, but by Act of July 23, 1866 (14 Stat. 208) it was continued in force.

Realizing that the additional pay was necessary, Congress made it uniform and controlled it and adopted the expediency of fixing its burden on the carriers because they received the benefit of having the services performed outside the custom house hours when free customs service was available.

Before, and at that time, the day pay of customs inspectors had long been inadequate to sustain them and their additional pay was a necessary item in their total pay. That was conceded. (S. Rep. No. 380, 41st Cong., 3rd Sess., p. 69.)

The additional pay was made uniform and statutory and Congress then adopted the expediency of casting the burden of that additional pay upon the carriers, upon the theory that services performed outside of the official daylight custom house hours of a port were primarily for the benefit of the carriers who should be required to pay the additional compensation, and so by that act Congress con-

tinued its policy of relieving Government from the burden of that additional pay and cast it upon the carriers and at the same time requiring the employees to work during unusual hours to earn the additional pay.

By Act of June 26, 1884 (23 Stat. 59, amending R. S. 2872) the provisions of the Act of 1873 were extended to sailing vessels. By Act of June 30, 1906 (34 Stat. 633), Sec. 2871 (R. S.), the act was amended to include lading as well as unlading of cargo and its provisions were extended from "vessels" to "vessels and other conveyances." This amendment presumably was for the purpose of allowing lading and unlading of bonded merchandise from railroad cars.

By Act of March 4, 1909 (c. 314, s. 2, 35 Stat. 1065), the Secretary of the Treasury was authorized, in his discretion, to "increase and fix" the pay of customs employees not to exceed in any case "the rate of $6.00 *per diem*." He tried to decrease, instead of increase, the pay of Inspector Williams, which resulted in the case of *Cochnower v. United States*, 248 U. S. 405, in this Court.

Act of February 13, 1911 (36 Stat. 899; App. 53)

The purpose of this act, as expressed in its title, was to provide for the unlading of vessels and other conveyances at night and for other purposes. It contained five sections and a repealing clause. The first four sections described the agencies of transportation to be affected by the payment of extra compensation. Section 5 fixed the rate and the method of collection by the collector of customs, and the payment to the customs officers performing the services.

The plan followed the expediency adopted in 1873 by requiring the United States be reimbursed by the carriers

receiving the benefit of the services. Section 5 required the Secretary of the Treasury to fix the rate of pay and also provided

> "* * * the said extra compensation to be paid * * * to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed by the secretary of the treasury."

The effect of this act was to enlarge the grant of additional pay and as in the case of Act of March 3, 1873, provision was made for a special license and for the filing of a bond to save Government from the liability.

In this act appeared the first provision made for appropriation of Sunday and holiday services for unlading of cargo. The wording of the act was peculiar: The Secretary of the Treasury was required to fix a rate of extra compensation for night services, with no mention of fixing such a rate for Sunday or holiday services, although payment for Sunday and holiday services was provided for in Section 5 of the act.

Status of Mr. William H. Bond

Petitioner cites at great length testimony taken at Committee Hearings in the 66th Congress (1920), 67th Congress (1922), 71st Congress (1930), and 75th Congress (1938).

Before proceeding with this history, we call the Court's attention to the fact that practically all of the testimony adduced at such hearings was given by William H. Bond and because of the great power attributed to him by petitioner, we deem it expedient to discuss his relationship with this legislation. In citing the testimony taken before such hearings, it is Mr. Bond that is referred to by peti-

tioner, with such phrases as "sponsor of Act 1911," "representative of the customs inspectors and their associations all over the country," "representative of customs inspectors association," "the person who drafted the 1920 amendment," "who spoke for the largest organization of customs inspectors," "a person who was successful in obtaining the passage of legislation which he advocated."

By reputation, Mr. Bond was a fine gentleman but we believe he was too modest to have accepted such praise and responsibility. From this testimony* it appears that he was a customs inspector from Boston; that he was president of a National Association of Customs Employees, which apparently was a very loose organization and which had not held a meeting for a long time; that his constituents were from the seaboard ports, but that he was somewhat known to the inspectors from the west; that he was not attempting to do anything for the inspectors on the Texas and Canadian borders because, as he put it, "they had a difficult situation and nothing could be done for them" (Hearings *(supra)* p. 13); that his interests were centered in getting increased pay for his constituents at seaboard ports.

With due respect to Mr. Bond and with no criticism of him personally, we point out that he in no manner represented respondents nor the customs officials at the Canadian or Mexican borders and that his interests admittedly were adverse to theirs and that he was willing that Congress discriminate against them in favor of his constituents at the seaboard ports, by denying the additional pay to the ones, while granting it to the others.

---

*Hearings, House Sub-committee on Ways and Means on H. R. 6577, 66th Congress, First Session, pp. 3, 4.

Act of February 7, 1920, 41 Stat. 402; U. S. C. (1940) Title 19, Sec. 267 (App. 88)

The above act, except the customary working hour proviso, so-called, with which it concludes, was introduced by the Treasury Department with the approval of the United States Shipping Board and of the American Steamship Association.*

The act was passed by both houses in Committee of the Whole. In the appendix at p. 100, we quote statements made on the floor at the time of its passage which show conclusively that Congress realized that customs officers were a much underpaid group of Federal employees and that for the good of the service it was then mandatory that a substantial increase in their pay be granted.

Mr. Treadway, the Manager of the Bill, stated that the pay of these inspectors has been very low, the rates being four, five and six dollars per day for a ten-hour day. That was in 1920. It is to be noted that these suits cover the period from 1931 to 1937 and are based on a rate of $5.83 per day, which is but a very little over the $4.00 rate, established in 1864, although the increase in the cost of living during that period of seventy-seven to eighty-three years of this country's growth had increased vastly more in proportion than the meager increase in pay reflected by these figures. The necessity of relieving the distressed financial condition of customs employees was conceded.

Mr. Huston from New York clearly expressed the situation then existing by referring to a letter describing

---

*Report of Committee on Commerce, Senate No. 306, 66th Cong., 1 Sess., also *International Railway Co. v. Davidson*, 257 U. S. 506, pp. 512, 513.

those conditions and received from the collector of the port of New York in which the collector stated substantially as follows: That these men were then getting practically the same scale of wages given them a quarter of a century ago; that they were rapidly losing their most efficient men; resignations were coming in daily; the force was then materially reduced beyond what it was prior to the first World War; merchants' associations and other organizations had interested themselves in the situation and were making appeals to Congress to take some steps in the direction of safeguarding the interests of importers and exporters. He pointed out that customs officials were harrassed with the consciousness that in many instances their children were suffering from the want of proper food and clothing, and that in spite of their knowledge that their employer, the Government, was the richest government in the history of the world, they still must go in poverty.

At that time (1920) the pay of customs inspectors was still controlled by the Act of April 29, 1864 *(supra)* which provided for a pay of $4.00 per day. The only change that had taken place since 1864 was that provided by Act of 1909 *(supra)* which authorized the Secretary of the Treasury to increase the wages of customs employees not to exceed, however, $6.00 per day.

According to the testimony of Mr. Bond, referred to by respondents, appropriations were made by Congress for such increases for two years but such appropriations were used for other purposes and that at his port (Boston) nothing was done to raise any pay until 1912, and that in 1920 about forty out of ninety inspectors at Boston were still on the $4.00 rate fixed in 1864.[1]

---

[1] Sub-committee of Committee on Ways and Means on H. R. 6577, October 11, 1929, p. 15.

The Treasury Department recognized that an equitable administration of the new Section 5 would require the spreading of assignments to duty at night and on Sundays and holidays evenly throughout the whole force. This is reflected by a provision of the regulations issued by the Bureau of Customs in 1920 as follows:[2]

> "With a view of equalizing as far as practicable, the extra compensation derived, assignments will be made to night work according to the rating order, exception only being made for reasons good to the assigning officer."

The act broadened the grant of additional pay again, by extending the services to which it applied to unlading passengers and their baggage, and it increased the rate of pay. It also removed the matter of additional pay from departmental regulations by making the rate statutory (App. 101).

The wording followed the same form as Acts of 1873 and 1911 by requiring the Secretary of the Treasury to fix a rate of extra compensation, notwithstanding the rate was made statutory. After this enactment the only activity to which the word "fix" could relate would be to require the Secretary to issue regulations carrying into effect the statutory rate. Accordingly he issued T. D. 38290 (1920) and ever since that time the statutory rate has been carried in the customs regulations.

The Act terminated an abuse to which customs inspectors had been subjected. Oftentimes customs inspectors would be called to duty at night and on Sundays and holidays for the purpose of unlading vessels and after being

---

[2] "Manual for the Guidance of the Outdoor Force of the Customs Service, 1920," on page 19.

required to remain on duty awaiting the arrival of such vessel, they were not paid for such services unless the vessel actually arrived and the unlading took place and also they were oftentimes required to remain on duty after 5 p.m. awaiting the arrival of such vessel and, likewise, were not paid unless the actual unlading took place (59 Cong. Rec., part 2, 66th Cong., p. 2171; App. 101, 102).

To correct that abuse, the amendments as appearing in the new Section 5 required payment of such extra compensation when the customs employee had been ordered to report for duty and had so reported and "remained on duty" regardless of whether the unlading took place or not (*id.*). The injustice of depriving them of such compensation was cited in the opinion of this Court in the Davidson case, *supra.*

In *Ferguson v. Port Huron and Sarnia Ferry Co.*, 13 Fed. (2) 489, 492, the Court pointed out that:

> "The word 'remain' in the clause referring to officers required to 'remain on duty between the hours' mentioned, means according to its proper interpretation, 'remain on duty after reporting for such duty.' The section itself provides that 'such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual work contemplated takes place or not. * * *'"

No change was made in the agencies of transportation to be affected by the extra compensation provisions of Section 5. In this act the word "overtime" was first used. Never before in all of this legislation, nor in any regulations thereunder, had the word "overtime" been used. How the words "overtime services" were substituted for the words "night services" as used in the old Section 5, is more fully discussed *infra*, p. 57. Peti-

tioner's construction of the words "overtime services" is based upon its contention that by using the word "overtime" in this section Congress thereby intended to divest customs employees of the grant of additional pay which they had theretofore enjoyed since 1799 to the extent that they would not become entitled to any further pay under such grant without first performing hours of service to be fixed in some manner, not quite clear, but which it is claimed with respect to the suits here involved, was fixed by the collector at the port of Detroit.

Petitioner cites certain statements made on the floor in Committee of the Whole at the time of the enactment of this amendment. These statements merely brought out the fact that more overtime would accrue at night on an eight-hour basis than on a ten-hour one. The matter of payment of overtime for working at night without first working during the day was not even discussed, nor was anything said or done from which it could be in any way intimated that Congress had any intent to impair the grant of additional pay that customs employees had theretofore enjoyed. It is a reasonable assumption that the concept of the meaning of overtime services then held by those members was that of work performed outside the customs house hours and reimbursable to Government. The final expression of their views with respect to overtime pay then being discussed is to be found in the words used in the statute.

Hearings, House Comm. on Ways and Means on H. R. 6577, 66th Congress, 1st Session, October 11, 1919

This committee had under consideration a bill to amend old Section 5, and which finally became the new Section 5. The committee had a letter before it from Mr. Rowe, Assistant Secretary of the Treasury, recommending the

legislation, and Mr. Bond was there to explain the intricacies of the customs laws and to secure an increase in the additional pay for his constituents at the seaboard ports. His was the only testimony taken.

Petitioner would explore the minds of Messrs. Rowe and Bond to ascertain what they meant by the word "overtime" and through them charge that meaning to the committee, and through the committee to Congress. The discussions involved night services only. Sunday and holiday services were not discussed, nor was the subject as to whether extra compensation became payable for night services, as such, as the plain language of the proposed Act indicated. The legislation under consideration was to affect only services in connection with vessels and other conveyances carrying cargo, and not to the facilities here involved.[1] Although it is apparent that Mr. Rowe thought otherwise at that time, because of the fact that immediately after the passage of the bill, the Treasury Department attempted to enforce its provisions with respect to the International Bridge involved in the Davidson case *(supra)*, and the eleven railroads crossing the Canadian border and involved in the Mellon case.[2]

The bill (Hearings, *supra* p. 3) as then being discussed does not contain the word "overtime," but describes with particularity the services to be affected by the increased grant of additional pay. The letter referred to (see petitioner's brief, App. 85) used the word overtime to describe services defined in the bill, and also referred to some arrangement to be made regarding tours of duty at night, and to be taken care of by future legislation.

---

[1] *International Ry. Co. v. Davidson*, 257 U. S. 506.

[2] *Mellon v. Minneapolis Ry.*, 11 F. (2d) 332, certiorari denied, 271 U. S. 678.

It was at this meeting that Mr. Bond informed the committee that although the inspectors on the Mexican and Canadian borders worked long hours, nothing could be done for them. Evidently the Treasury Department thought otherwise, because of its attempted enforcement of the final measure on the Canadian border.

It is fair to assume that the outstanding concept of overtime in the minds of those two men, and that committee, was that it meant work performed at night or on Sundays or holidays when the burden of the pay would be cast upon the carriers; but it is not into the minds of those two that we should look to determine the effect of the statute, but to the plain meaning of the words used by Congress to express its intention.

The meaning of overtime which petitioner imputes to Congress through those two men impairs the grant of additional pay enjoyed by inspectors since 1799. There is nothing in those proceedings from which we can impute to Congress any intention to impair that grant. Those proceedings have no probative value on the interpretation of the pertinent statute.

The weight to be given to such statements is discussed in the case of the *United States v. Beaver Run Coal Co.*, 99 Fed. (2d) 610, 613, wherein the Circuit Court of Appeals for the Third Circuit stated:

> "We cannot gather the intention of Congress from the statement of a single member thereof (*United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 S. Ct. 540, 41 L. Ed. 1007) but if we could, we would not be entitled to rewrite the statute to make it comply with his statements. That an act covers a somewhat broader field than Congress originally intended, does not confer upon the courts the power to read into that act restrictions and limitations which are not there."

International Railway Co. v. Davidson, 257 U. S. 506.

By including services in connection with the examination of passengers and their baggage in the grant of additional pay the Secretary of the Treasury concluded that the new Section 5 applied to the traffic over the International Bridge at Niagara Falls, which was a toll bridge carrying streets cars and pedestrian traffic, and attempted to enforce the provisions of the act at that facility resulting in the above mentioned case. This Court had little difficulty in pointing out that the new Section 5 was but a part of the Act of 1911 and that both the old and new Sections 5 affected only the agencies of transportation described in the first four sections of the act, and related only to vessels or other conveyances carrying cargo and did not relate to the plant of a toll bridge carrying street cars and foot passengers.

Also, it was pointed out that by the Act of 1799 and subsequent legislation, two distinct systems had been maintained for the examination of articles brought into this country, one relating to merchandise imported into the country and the other to passengers and their personal effects and that it could not be presumed that by merely broadening the extra compensation provision of Section 5 to include the examination of passengers and their baggage, that Congress thereby intended to terminate that system. The Court held that the provisions relating to passengers and their baggage is given full effect when applied to passengers arriving in vessels such as were described in the first four sections of the act.

Hearings 67th Congress (1922 Tariff Act)

Petitioner cites hearings before a Senate Committee on Commerce in the 67th Congress (1922 Tariff Act), on S-1504, S-1774 and S-3188. The statements again relied upon were made by Mr. Bond. Petitioner contends that the views expressed by him regarding the effect on extra compensation for eight hour shifts at night, was thought by the 66th Congress (1920) to be implicit in its provisions. Also, it is claimed that Mr. Bond interpreted the working hour proviso of the statute for the benefit of the committee and with the inference that the committee, and through that body, Congress itself, adopted Mr. Bond's views. Such inferences are entirely unfounded.

Two of the bills then under consideration, namely, S-1774 and S-2188, affected the customs service. Both bills were proposed as amendments to the new Section 5. One affected ferry companies operating vessels on regular runs from foreign ports not more than 200 miles distant, and the other affected railroad trains arriving from contiguous foreign territory. Both sought to have their respective facilities relieved from the obligation of the payment of additional compensation for night, Sunday and holiday services of customs employees which the Secretary had begun to enforce under his erroneous construction of the new Section 5, relating to passengers and their baggage.

When the hearings were being concluded the opinion of this Court in the Davidson case *(supra)* was handed down, from which it then appeared that the traffic with respect to railways and bridges then being discussed, was not affected by the provisions of the new Section 5. The committee made no report so there is nothing to indicate what recommendations it would have made to Congress regarding the problems discussed by Mr. Bond and others, and

on which there was *"implicit"* understanding, as suggested by petitioner, among all those seeking to escape the burden of the grant of additional pay.

Most of the operators of important railroads and international bridges in the country were represented at those hearings, and they were strenuously urging that Congress relieve them from the extra compensation provisions of the new Section 5. We concede that there was "unanimity" among them in their desire to escape that burden but that they "conceded" themselves liable for customs service only when performed on a "regular tour of duty" is refuted by the fact that one of the facilities there represented urged upon the committee a further amendment, by the terms of which it asked specifically to be relieved from the grant of additional pay for work performed within a 6-day weekly schedule. (See copy of bill, App. 90.)

That the railroads "conceded" themselves liable for such services on regular tours of duty, is borne out by the fact that in the 70th Congress (1928) they introduced another bill (H. R. 12103) to relieve themselves of such liability. (See App. 90.)

The offering of such an amendment leads to the natural conclusion that under the law then existing customs employees were entitled to extra compensation for services performed on regular tours of duty of eight hours, when assignments to such tours of duty included night, Sunday or holiday services, although performed within a six-day week.

A brief filed with the committee by Mr. Bond states

> "* * * the only charge being for *Sundays and holidays, days which are universally recognized in all industries to be overtime.*" (Italics ours.) (Hearings *supra*, p. 145; petitioner's brief p. 119.)

At that time, the employees were ~~required~~ REQUIRED to work seven days a week and if absent on Sundays or holidays, those days were charged against them.

What Congress decided to do about the problems that were discussed before that committee, is to be found in the plain provisions of the Tariff Act of 1922, and the normal meaning of the words there used, and not in the testimony of Mr. Bond or the "implicit" understanding of those seeking to escape the burden of the grant of additional pay.

In that act, Congress took a position which was just the opposite from that requested in those two bills, and by enacting the administrative provisions of the 1922 Tariff Act made clear its intention that when customs employees were required to work at night or on Sundays or holidays in connection with protecting the revenue at international ferries, bridges, tunnels and railroads, additional compensation must be paid them and the Government be reimbursed therefor by the transportation companies receiving the benefit of such services, so rendered outside the official hours of the customs house.

Tariff Act of 1922

The decision of this Court in the Davidson case, *supra*, was handed down on January 30, 1922, while the 1922 Tariff Act was under discussion. The Tariff Act was approved on September 21, 1922. It was a general revision of the tariff laws. That they were inadequate and needed revision had long been recognized by Congress. (Report 248 on H. R. 7456, 67th Cong., 1 Sess. 1922 Tariff Act, p. 1.)

The repealing sections of the 1922 Tariff Act are Sections 642, 643 and 644 (42 Stat. 989, 990). Two hundred

eighty-eight (288) sections of the revised statute were specifically repealed, besides many acts and parts of acts in the statutes at large. Section 644 provided that "all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed."

The repealed sections included practically all of the pertinent provisions regulating the following subjects, being found in Title XXXIV of Revised Statutes in the chapter and at the pages indicated: Entry of Merchandise, c. 4, p. 539; Unlading, c. 5, p. 557; Appraisal, c. 6, p. 564; The Bond and Warehouse System, c. 7, p. 573; Payment, c. 8, p. 582; Drawback, c. 9, p. 584; Enforcement of Duty, Laws and Punishment for Violations, c. 10, p. 591; Provisions relating to commerce with contiguous countries, c. 11, p. 597. In fact, a new tariff act was created.

The effect of this revision upon the decision of this Court in the Davidson case was discussed in the Ferguson case, *infra*, at p. 41, and the Mellon case, *infra*, at page 42. In both of those cases the Court held in substance that the agencies of transportation to be affected by payment of additional compensation for night, Sunday and holiday services were redescribed in Sections 450 and 451 of the 1922 Tariff Act and made to affect all of the facilities and services here involved and that the distinction theretofore maintained in the examination of imported merchandise and passengers, their baggage and personal effects, had been terminated. The application of the act to all such facilities is not challenged, except with respect to its application to the bridge and tunnel.

Although this act repealed other sections of the Act of March 2, 1799 as carried into the revised statutes, it did not repeal Section 2 of that act (1 Stat. 706) or R. S. 2733 into which that section was carried, and which section fixed the day pay of customs inspectors on a per diem basis;

Acts of March 4, 1923 and May 29, 1928

The Act of March 4, 1923 (Ch. 251, 42 Stat. 1453; U. S. C. Tit. 19, and referred to as the Classification Act of 1923, as expressed in its title, was enacted for the purpose of providing the necessary organization of the customs service for an adequate administration and enforcement of the Tariff Act of 1922 and all other customs laws. It brought customs employees under civil service and authorized the Secretary of the Treasury, except as otherwise provided by law, to fix their compensation with a maximum increase of 30%, except as to laborers. We have no information on what action, if any, was taken with respect to this authorized increase.

By Act of May 29, 1928 (Ch. 865, S. 1, 45 Stat. 955), the base pay of customs inspectors was placed on an annual basis, commencing at $2,100.00 per annum. Since 1799 it had been on a per diem basis.

Cases Construing the Pertinent Statute

The statute has been before the courts for construction in the following cases:

International Railway Co. v. Davidson, 256 U. S. 506.

This case involved the construction of the Act of February 13, 1911, as amended by the new Section 5 in 1920, and before the Act of 1911 had been repealed by the 1922 Tariff Act. The opinion in this case is important because in discussing the meaning of the new Section 5, this Court pointed out that the new Section 5 "defined what was to be deemed overtime," and also pointed out that that Section 5 related only to the vessels and other conveyances described in the first four sections of the Act of 1911.

(Vessels and other conveyances carrying cargo and required to make entry.)

Port Huron & Sarnia Ferry Co. v. Lawson, 292 Fed. 216.

After the 1922 Tariff Act became effective, the Port Huron & Sarnia Ferry Company filed a bill to enjoin the collector at Detroit from enforcing the provisions of the act with respect to the ferries at Port Huron, Michigan, which carried vehicular traffic and foot passengers. The *Davidson* case, *supra*, was cited and relied upon. In denying the contention of the Ferry Company, the District Court held: "* * * There is no vagueness, no uncertainty in the provisions of Section 450 * * *. The requirements of the next Section, 451, * * * are equally clear." It pointed out that over 200 sections of the Revised Statutes and numerous other acts and parts of acts were repealed by the 1922 Tariff Act, together with all laws and parts of laws inconsistent with the provisions of this act.

Ferguson v. Port Huron & Sarnia Ferry Co., 13 Fed. (2d) 489.

In this case, the collector at Detroit sued the Port Huron & Sarnia Ferry Company for extra compensation of customs employees, payment of which had been withheld during the litigation in the *Lawson* case, *supra*. The suit was to recover for services performed at night, as well as on Sundays and holidays.

The Ferry Company defended on the ground that extra compensation or "overtime" was not earned until the officers had worked their regular time. The Government in that case took just the opposite position from that which it is taking in these cases. It there contended that

extra compensation was payable for night, Sunday and holiday services as such, without reference to other hours of service. The decision of the District Court is important as bearing upon the meaning of "overtime" and is hereinafter further referred to (p. 59).

Mellon v. Minn. St. Paul & S. S. M. Ry., 11 Fed. (2nd) 332, cert. denied, 271 U. S. 678.

This case involved the traffic of eleven great railway systems crossing the Canadian border at points from Maine to the Pacific Coast. The Wabash Railroad and the Michigan Central Railroad, parties to that suit, were then operating three of the facilities involved in the present cases, namely, the Wabash Slip Dock and the Michigan Central freight station and passenger station. (R. 41). The traffic involved at these stations was practically continuous and required that the revenue be protected by assignment of customs inspectors to tours of duty so as to cover practically the whole twenty-four hours of every day. The Court held that the act applied to night, Sunday and holiday services at those railway facilities.

The Davidson case was again relied upon. The Court pointed out that the first four sections of the Act of 1911 had been repealed by the 1922 tariff act and that the description of the agencies of transportation to be affected by the extra compensation provisions of Section 5 must now be found in Sections 450 and 451 of the Tariff Act. The railway companies urged that the extra compensation provisions applied only to the common carriers of bonded merchandise. The Court cited the District Court's opinion in the *Lawson* case, *supra*, and pointed out the effect of the 1922 Tariff Act and held that the act ap-

plied not only to the ferry companies carrying passengers but also to the railroads carrying passengers with their baggage across the international border.

71st Congress

Petitioner cites reference to hearings, Senate Finance Committee, 71st Congress, 1st Session, on H. R. 2667, to the effect that the carriers conceded themselves not to be liable for this extra compensation when the services were performed within a regular tour of duty, and that the Secretary of the Treasury likewise conceded such to be the case: These conclusions are deduced from the following history. In the 70th Congress (1928), the carriers, not conceding, but apparently recognizing they were liable for services performed within such tours of duty on Sundays or holidays, introduced in the House a bill, H. R. 12103 (App. 90), to relieve themselves from such liability. The bill never was reported out and was referred to Senate Committee on Finance in 71st Congress, whose hearings are extensively quoted by petitioner.

Ogden Mills, then Secretary of the Treasury, was supporting legislation to relieve carriers of such obligation, and in connection with said bill, H. R. 12103 (70th Congress), wrote a letter on the subject bearing date of April 9, 1928 (Hearings *supra* p. 10278). The real effect of the bill was to release carriers from liability when service was to be performed on such tours of duty. It is such "concessions," so made by the carriers and approved by Mr. Mills, that petitioner relies upon in support of its theory, that although Congress refused to pass such legislation, nevertheless it had the effect of imputing to Congress, in the enactment of the 1930 Tariff Act, the legislative approval of the practices so "conceded."

The relief sought to be obtained for the carriers by H. R. 12103 in 70th Congress *(supra)* was embodied in H. R. 2667 and introduced in both the House and Senate in the 71st Congress.[1] The bill was referred to House Committee on Ways and Means and to Senate Committee on Finance, and both committees conducted hearings. The hearings before Senate Committee on Finance, cited extensively by petitioner, represents the efforts of the carriers to relieve themselves from such liability, and the references cited by petitioner should be read with that in mind.

The bill (H. R. 2667) sought to accomplish the purpose of the carriers by an amendment to Section 451 of the Tariff Act, which would specifically exclude from the extra compensation provisions of the act, services in connection with bridges, funnels and ferries at the frontier ports. Mr. Bond again appeared in behalf of customs employees at the seaboard ports, accompanied by Mr. Brandon, counsel for his organization. It is information alleged to have been gleaned by members of Congress from the statements at those hearings, upon which petitioner relies in his theory of legislative approval.

The House Committee made a report and recommended the proposed legislation.[2] The gist of the report was that under the law, customs employees were entitled to extra compensation for overtime services in connection with railroad trains, ferry boats, international bridges or tunnels, and recommended that those facilities be relieved of such obligation. The Senate committee failed to report out the bill and it never became law.

---

[1]The bill appears at p. 529, Hearings Senate Committee on Finance, 71st Cong., 1st Sess., on H. R. 2667, Vol. XVII.

[2]Report No. 7 to accompany H. R. 2667, 71st Cong., 1st Sess., p. 70, and the amendment as voted by the House on p. 213 id.

Statements made before those committees still leaves in doubt the practices then existing with respect to Sunday and holiday pay, that is, as to whether payment therefor was being made because the work fell within the grant made by Congress, for additional pay for Sunday and holiday work, or whether it was being paid for services in excess of 48 hours per week. The fact that it was being paid is not disputed except at the bridge and tunnel which were not then operating. The regulations of the Secretary of the Treasury requiring customs employees to work seven days a week were in effect, and if they did not work on Sundays or holidays, they were charged back for those days. (See 1915 regulations, App. 82.)

Also it is to be noted that this Court had already defined the word "overtime," and that definition became a part of the 1922 Tariff Act; that the District Court of the United States had construed the word "overtime" in the *Ferguson* case, *supra*, in which it adopted the definition placed upon that word as then urged by the Secretary of the Treasury; that the liability of the additional pay had been litigated by eleven great railroads, whose facilities crossed the Canadian border, resulting in the *Mellon* case, *supra*, in which it was held that night, Sunday and holiday services in connection with the traffic on those railroads, much of which was being performed on tours of duty covering 24 hours per day, fell within the grant of additional pay.

We suggest that it is more reasonable to conclude that by enacting the administrative provisions of the 1922 Tariff Act into the 1930 Tariff Act, while at the same time denying the insistent demands of the carriers to be released from liability. Congress approved the law of the Davidson, Ferguson and Mellon cases and the regulations of the Secretary of the Treasury, issued for the guidance

and control of the Bureau of Customs, rather than the illegal practices, which those committes were informed, existed.

It is to be noted, also, that the grant of night, Sunday and holiday pay made by the 1922 Tariff Act was not impaired by that Congress, but on the contrary the provisions for its enforcement were extended so that the drastic penalties for its violation were made to include the unlading of passengers, in violation of the act (19 U. S. C., s. 1454; 46 Stat. 716), which penalty had been omitted from the 1922 Tariff Act, although made unlawful by that act.

75th Congress (Customs Administration Act, 1938)

Petitioner cites statements regarding the then existing practices, made before House Committee on Ways and Means and Senate Sub-committee of Committee on Finance, 75th Congress (1938) in further support of its theory of legislative approval. H. R. 6738 was introduced in the House by Mr. Dalton at the request of the Treasury Department which had access to legislative process. The synopsis submitted with the proposed bill stated its purposes and effect to be to provide payment of overtime compensation for the few cases then not affected by the overtime provisions of the customs law (p. 35 House Hearings, *supra*). A distinguished group of counsel appeared before that committee in support of the proposed bill. They were Messrs. Clinton M. Hester, Assistant General Counsel, and William R. Johnson, Chief Counsel for the Bureau of Customs, and Stephen J. Springarn from the office of the General Counsel of the Treasury Department. No one appeared for or on behalf of customs employees whose compensation was at stake.

Questioning as to the purposes of the legislation brought the further information that it sometimes happened that

merchandise leaves or comes into the country otherwise than by a vessel or vehicle, such as the driving of cattle across the border. In order to permit the drivers of the herds to use the highways at night time, it was necessary to assign customs inspectors to that duty and the proposed bill would enhance the interests of customs employees by including those services within the grant of additional pay. Hearings, id. 87, 89.) Also, it was to affect any other merchandise brought into the country under such conditions. It was to benefit customs employees that the legislation was sought.

The provisions of the bill appear at App. 93. We herewith paraphrase certain portions of that bill which would affect all of the services here involved in order to more clearly demonstrate its true purport.

> "Upon a request made by * * * a common carrier * * *, for the services of customs officers or employees at night or on a Sunday or holiday * * *, the collector shall assign available customs officers or employees in accordance with the request to perform any services which may lawfully be performed by them during regular hours of business * * *. *If qualified customs officers or employees on regular duty are available to perform the requested services, they shall perform such services without extra compensation.*" (Italics ours.)

We now find that the bill, introduced by the Treasury Department for the purpose of providing additional pay in connection with the movement of cattle across our borders on highways at night and otherwise for the benefit of customs employees, turns out to be a means of extinguishing the grant of additional pay which the carriers had been unable to accomplish in the Mellon case and before the 67th, 70th and 71st Congress.

The question apparently arose in the mind of Representative Dingell as to why the last sentence (liability termination clause) in the proposed bill was necessary which eliminated such extra compensation, if no such liability therefore then existed.

And Mr. Johnson explained (Hearing, *supra*, p. 89):

> "Mr. Johnson: Those provisions complete the thought and take care of the situation where we do have regular tours of duty outside of usual office hours of the port."

It was brought out that payment for night, Sunday and holiday work at the ferries had been stopped because it was not to be paid at the Ambassador Bridge. Mr. Dingell charged that any such practice had not been authorized by Congress (Hearing, *supra*, p. 89). That bill was not reported out, but in changed form was passed by the House and was introduced in the Senate as H. R. 8099 and referred to Sub-committee of the Committee on Finance and hearings had therein.† The "liability termination" clause with which H. R. 6738 concluded, was omitted and in its place appeared the "Public Interest Proviso," so-called, with which Section 451 now concludes, and upon which petitioner further relies in its theory of administrative approval.

It is claimed by petitioner that statements were made before the Senate committee, which in effect, conceded that the extra compensation provisions of the act were not applicable to the bridge or tunnel (Petitioner's Brief, p. 61) and that the Treasury Department made the same representations, although the practices of the Bureau of Cus-

†Hearings, Sub-committee of Senate Committee on Finance, on H. R. 8099, 75th Congress, 3rd Session.

toms then in force suggested a different conclusion. Inferentially at least, the Bureau acknowledged that the bridge and tunnel came within the grant of Sunday and holiday pay by compensating employees for work on those days by granting them compensatory time off (see Testimony of Petitioner, R. 70) and by proposing a bill in Congress by which that liability could be terminated. If the bridge and tunnel were not affected by the provisions of the Tariff Act, "compensatory time off" would be unnecessary.

Public Interest Proviso

The history of this proviso shows clearly why it was introduced and enacted.[1] It appears from that record that Mr. Eli Frank, Jr., counsel for National Customs Service Association, was the person who introduced the working proviso, and that it was introduced by him in the House in connection with another amendment there introduced by him, which would prohibit the practice of compensatory time off such as was then in use at the bridge and tunnel in Detroit, whereby customs employees were required to work on Sundays and holidays and be compensated therefore by time off during the week. In the words of the proposed amendment, the collector would have no authority "to make assignments to regular duty on Sundays or holidays * * * in the place of assignments to regular duty on other days or nights."

The Treasury Department objected to the proposed amendment on the ground that it challenged their general authority to make assignments to duty on Sundays or holidays. As Mr. Frank stated (Hearing, p. 60):

> "In order to make certain that such authority in the Department was to remain unimpaired, the last

[1] Hearings, Sub-committee of Committee on Finance Finance, 75th Congress, 3rd Session on H. R. 8099, p. 59.

sentence of the present section 8 was inserted as follows:

> 'Nothing in this section shall be construed to impair the existing authority of the Treasury Department to assign customs officers or employees to regular duty at nights or on Sundays or holidays when such assignments are in the public interest.'" (This is the Public Interest Proviso [saving clause].)

When the bill passed the House, the challenging portion of the bill was deleted, as was the "liability termination" clause of the bill introduced by the Treasury Department, but the saving clause (public interest proviso) as introduced by Mr. Frank was retained and appeared in the bill (H. R. 8099) in the place of the "liability termination clause" which the House refused to pass.

Thus, it conclusively appears that the plan and purpose of the Public Interest Proviso when introduced by Mr. Frank, was in the nature of a saving clause against the impairment of the authority of the Secretary of the Treasury to assign customs inspectors to duty. It was not for the purpose of limiting in any way the rights of Customs employees. No one was challenging the authority of the Secretary of the Treasury. All of the rights mentioned in the Public Interest Proviso had been exercised by him since May 8, 1792 (2). His authority was not being impaired.

The purpose of H. R. 8099, as introduced in the Senate, is described in the synopsis of its provisions which appears on p. 13 of said hearings *(supra)*, from which it appears that its principal purpose was to increase the sweep of the grant of night, Sunday and holiday pay to include such services as were not theretofore covered, such as the case of livestock driven into the country.

From the debates in Congress on this bill, it appears that the purpose and effect of the bill was to permit the

Treasury Department, if it saw fit, to bring bridges and tunnels within the sweep of the grant of night, Sunday and holiday pay (81 Cong. Rec. 9391). It was represented that the grant of extra pay did not then apply to such facilities, because of the decision in the Davidson case *(supra)*, by this Court. The fact that these suits had been filed (Sept. 29, 1937), and were then pending, challenging that construction of the act by the Department, was not brought to the attention of Congress, and the bill was enacted by Congress into law on the belief that it was bettering the status of customs employees, and with no thought, whatsoever, that the legislation so proposed by the Treasury Department would be turned against the very persons whose interests they were supposedly advancing.

Certainly, anyone examining the provisions of that Public Interest Proviso in itself can find nothing therein which would in any manner increase the authority granted to the Secretary by Act of May 8, 1792. The proviso gave the Secretary no power to make assignments to duty at night or on Sunday or holidays without extra compensation, nor to interfere with the pay of customs employees which had been granted by Congress. The effect to be given to this proviso, by petitioner, is the same as the effect of the liability termination clause, *supra*, would have been had not Congress refused to pass it. We suggest that circumstance, in itself, precludes any legislative approval of the practices which Congress so specifically refused to approve.[1] We suggest that if the theory of legislative approval is to be applied to the action of Congress in the 75th Congress, it tends to disprove and not to support petitioner's theory of the meaning of overtime services.

[1] "Amendments made, or proposed and defeated, may also throw light on the construction of the Act as finally passed and may properly be taken into consideration." Lewis Sutherland, Stat. Const., 2 Ed., S. 470, p. 880.

Administrative Practices and Legislative Approval

Analyzing the legislative history relied upon by petitioner, we find that it amounts to nothing more than statements made to several committees informing the members that overtime was not being paid for night services when performed on regular tours of duty, although two bills had been introduced in Congress to terminate the liability for such services.[1] Also that it was being paid for Sunday and holiday services. Except as to the 75th Congress, the bills considered by the committees never reached Congress.

However, there is no evidence that Congress was influenced in any manner whatsoever by the statements relied upon. In fact the evidence points to the contrary. Respondents contend that the probative value of those statements is nil, and that there is no evidence of an intention on the part of Congress to depart from its steadfast purpose of maintaining the grant of additional pay.

The limitation as to the use of such statements is expressed in the case of *U. S. v. Trans. Missouri Freight Assn.*, 166 U. S. 290, 318.

The Secretary of the Treasury never issued any regulation adopting the alleged practices of the Bureau of Customs. As a matter of fact, under the published regulations it was necessary for the employees to work on Sundays or holidays, or those days would be charged against them.

The effect of a practical construction must be in a matter so important and so long continued, that the Legislature would presumably have knowledge of it. *Lewis*

---

[1]Amendments made, or proposed and defeated, may also throw light on the construction of the Act as finally passed and may properly be taken into consideration." Lewis Sutherland, Stat. Const., 2 Ed., S. 470, p. 880.

Sutherland, 2nd Ed. Vol. 2, p. 782. We suggest that the cases before the Court are controlled by

U. S. v. Dickson, 15 Peters (U. S.) 141, 161 and *Koshland v. Helvering*, 298 (U. S.) 441, 446, 447.

In the Dickson case the uniform construction of an Act of Congress made by the Treasury Department over a period of years from 1818 to 1834, was struck down as not in conformity with the act upon which it was based.

In the Koshland case a regulation issued by the Treasury Department under the 1921 Revenue Act, although of long standing and universally acted upon, was struck down because the regulation was not justified under the statute.

IV.

MEANING OF "OVERTIME SERVICES"

Respondents contend, that as used in the pertinent statute, the words "overtime services" were intended to, and do, mean those night, Sunday and holiday services which were to be reimbursed to Government and which were to be performed outside of the Customs House hours of a port when free customs service is available.

It is not necessary to look beyond the plain wording of Section 5 to find the meaning of the words "overtime services." The statute clearly provides that services performed at night and on Sundays and holidays shall be deemed to be "overtime services." The fact that no other standard is fixed in the act supports that conclusion. The Court of Claims did not need to go beyond the plain meaning of the words of that section to reach its conclusion. Neither did the Court in the Ferguson case *(supra)* nor this Court in the Davidson case *(supra)*. The meaning of "overtime services" in every regulation issued by

the Secretary of the Treasury has followed the definition of the statute.

Act May 8, 1792, 1 Stat. 280, R. S. 249, Title 19, U. S. C. s. 3 vested authority in the Secretary of the Treasury to superintend the collection of duties on imports. Under that statute and its successor, classification act of 1923 (Act March 4, 1923, s. 2; c. 251, 42 Stat. 1453; tit. 19, U. S. C., s. 6) he was given and exercised broad powers in requisitioning the services of the outdoor force of customs employees, and under that statute it always has been and is now conceded that he may require customs employees to work during any number of hours per day which he may fix and for 365 days per year.

Customs regulations always have reserved the right of the Secretary to require long hours of service. The regulations have uniformly provided for official hours of business during which customs offices are open and has excluded Sundays and holidays from those hours. The field force, however, does not work within those offices and their hours of service are regulated under a different part of the regulation which sets up the official hours for certain employees. The official hours of the field force herein involved are prescribed by Article 1462 (b), (App. 82). However, the Secretary reserves the authority, by sub-section (c) of that article, to extend these hours without extra compensation, except as affected by the grant of additional pay.

In practice, customs employees always have been required to work long hours, sometimes working all night after having worked the previous day and then reporting again for duty on the following day and without extra compensation except when the services were affected by the grant of additional pay.

Prior to Act of May 29, 1928 *(supra)* the pay of customs employees was fixed on a per diem basis "for days actually

worked in aid of the customs." They were required to work on Sundays and holidays in order to earn their base pay. If they did not work on Sundays and holidays those days were either charged against them or charged against their annual or sick leave. Likewise absences for fractional days were charged against them (1915 Reg. App. 82).

The pay of customs employees is, and always has been, fixed by statute. The Secretary never has been vested with authority to pay overtime, within the meaning of that word as contended by petitioner, nor was the Secretary ever vested with any authority to define what should constitute overtime. Congress chose to, and did, define the meaning of that word in the new Section 5 and no other definition has ever been given. It is there defined as services performed between 5 p. m. and 8 a. m. and on Sundays and holidays. Congress also fixed the rate of pay for that overtime and it was illegal for the Bureau of Customs to compensate the employees at Detroit by granting them "lieu" days for Sunday and holiday work.

The only additional pay or other compensation which the employee may receive is that which is fixed by statute. Under such a statute "overtime" as contended by petitioner becomes impossible.

Universal Acceptance of Extra Pay for Work on Sundays and Holidays

In most industries, if an employee works on a Sunday or a holiday he is entitled to extra pay. Such always has been, and now is, the universally accepted practice. The standard union contracts of today provide for the payment of overtime for Sunday or holiday services as such, except as temporarily affected by wartime legislation or regulations. In the pertinent legislation, Congress steadfastly protected that right for customs employes. Work

on Sundays and holidays is in truth and in fact "overtime." (*Ferguson v. Port Huron and Sarnia Ferry Company*, 13 Fed. (2nd) 389, 494.) In this statute "night" services are placed on the same footing as Sunday and holiday services.

That the grant of additional pay was not connected with the necessity of prior hours of servi , appears conclusive from the pertinent legislative history. The conditions under which Congress intended that extra compensation should be paid is expressed by it in apt language in each succeeding grant, and is there expressed in terms of services performed at night or on Sundays or holidays.

That such must have been the intent of Congress also is evidenced by the mandate of the statute requiring that a special license must be obtained and bond filed in every case of unlading at night, or on Sundays or holidays from the carrying vessel or vehicle. If those services are not to be affected it requires the performance of the useless burden of securing a special license and filing a bond.

It is true that payment is required to be made in accordance with the provisions of Section 5. But that section can have no greater effect than a proviso, and should be strictly construed so as to take nothing out of the enacting clauses of the Tariff Act which does not fall fairly within the terms of the proviso (see *infra* p. 70). There is nothing in Section 5 which can be construed to deprive customs employees of the substantial rights held by them since 1799 and continued in effect by Sections 450 and 451 of the Tariff Act.

"Overtime Services" Used to Denote Night, Sunday and Holiday Services

By comparing the wording of the old and new Sections 5 it becomes clear that the words "overtime services" were

used in the new Section 5 in substitution for the words "night services" in the old Section 5, when it became appropriate to include within the sweep of "overtime services" Sunday and holiday services as well as night services.

We here set out the appropriate words as used in both sections, the words in plain type being those used in the old Section 5 and retained in the new Section 5, those in brackets being words used in the old Section 5 and deleted in the new Section 5, and those in italics appearing for the first time in the new Section 5, viz.:

> "The Secretary of the Treasury shall fix a reasonable rate of extra compensation for [night] *overtime* services of inspectors * * * *who may be required to remain on duty between the hours of five o'clock post-meridian, and eight o'clock ante-meridian, or on Sundays or holidays, to perform services* in connection with the lading or unlading of cargo [at night] * * *"

In the old Section 5 the words "night services" were used synonymously with services "in connection with the lading or unlading of cargo at night * * *." But when it became expedient to use language in the new Section 5, properly describing Sunday and holiday services as well as night services, it became necessary to delete the word "night" and to use in substitution therefor a word which would appropriately describe not only night services but Sunday and holiday services as well.

So we find in the new Section 5 that the words "night services" are replaced by the words "overtime services," and likewise that the phrase

> "in connection with the lading or unlading of cargo at night * * *"

has been replaced by the phrase

> "duty between the hours of five o'clock postmeridian and eight o'clock antemeridian or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo * * *."

Just as in the old Section 5, the words "night services" were used synonymously with services "in connection with the lading or unlading of cargo at night," so the words "overtime services" in the new Section 5 are used synonymously with "duty between the hours of five o'clock postmeridian and eight o'clock antemeridian or on Sundays or holidays * * *, in connection with the lading or unlading of cargo." Thus it is clear that the words "overtime services" were used in the new Section 5 to denote "night, Sunday and holiday services."

Petitioner would lead us to believe that Congress intended to impair the grant of additional pay, which had been safeguarded for one hundred and twenty-one years, simply by substituting the words "overtime services" for the words "night services" under the conditions hereinbefore cited. Certainly if Congress had intended to change its policy with respect to that grant, it would have used apt language to express that intention instead of using language the normal meaning of which prohibits such an interpretation.

When the new Section 5 was before this Court for consideration in the Davidson case, the Court stated that Section 5 defined what should be deemed to be overtime. There being no definition of "overtime" in the statute, other than the night, Sunday and holiday hours therein specified, we must conclude that the new Section 5 gives its own definition of "overtime" to be those hours of service so specified in the statute. The 1922 Tariff Act was under consideration in Congress when that opinion was handed down. The definition of "overtime" as given by

this Court in the Davidson case, was adopted by Congress in the administrative provisions of the 1922 Tariff Act. When Congress enacted that act, that it had in mind the opinion of this Court in the Davidson case *(supra)* cannot be denied. Evidence of this is in the definition given the words "vessel" and "vehicle" after this Court had placed a limitation on the words "vessel or other conveyance" as used in the old Section 5.

When Congress incorporated the new Section 5 into the 1922 Tariff Act by reference, without any change in its construction, it is presumed to have adopted the meaning given by this Court to the word "overtime" in the Davidson case, and that definition then became a part of the Tariff Act.

Latimer v. United States, 223 U. S. 501, 504.
Sessions v. United States, 145 U. S. 29, 42.

In this connection it is to be noted that in the definition section of the Tariff Act (Sec. 401, 46 Stat. 708; U. S. C., tit. 19, sect. 1401) appears no definition of "overtime," although definitions of all other important words used in the statute appear therein. The question naturally arises, why was the definition omitted for such an important word as "overtime"? The answer is clear and conclusive. This Court had already defined what was deemed to be "overtime" in Section 5 and Congress was satisfied with that definition. Otherwise, it would have changed that definition.

Definition in the Ferguson Case (supra)

The meaning of the word "overtime" was squarely at issue in the above case. Here, the collector sued the Port Huron and Sarnia Ferry Company for night, Sunday and holiday services of inspectors. The defense urged was

that they had not first performed their regular hours of service. The Government took just the opposite view in that case that it has taken in these cases. It there maintained that overtime was payable for night, Sunday and holiday services as such, without reference to other hours of service.

The contention of petitioner that the services there performed were Sunday services in excess of a weekly schedule is refuted by the defense there raised, viz., that regular hours of service must first be performed before overtime is earned.

In that case, the District Court used the following language:

> "It is claimed by defendant, and denied by plaintiff, that 'overtime pay' is not earned, on any particular day, within the meaning of this statute, unless the officer seeking such overtime pay has first earned his regular pay for such day by working during the regular hours on that day; that is, in the words of defendant in its brief, 'to be entitled to "overtime" the inspector must first have given his contract, or normal time of eight hours--otherwise, there could be no "overtime."' I cannot agree with this contention. Congress could easily have used language in the statute which would have expressed such an intention, but it has not done so. The term 'overtime' appropriately expresses the meaning, and in my opinion was intended to express such meaning: 'Beyond the regular, fixed working hours.'"

Meaning of "Remain on Duty"

Petitioner cites the use of the words "remain on duty" as used in new Section 5. Those words did not appear in the old Section 5, nor in the Act of March 3, 1873, but were used in the new Section 5 for the first time. They

were so used in connection with the amendment in the new Section 5 which terminated a prior abuse to which customs employees had been subjected by their being required to report for duty, and in many instances, being obliged to wait many hours for the arrival of a vessel, and then were not paid the additional compensation unless the vessel arrived and the unlading actually took place* (*supra* p. 31).

It is clear that the words "ordered to report for duty" used in Section 5 mean the same as the words "assigned to duty" as used in Section 451. The words "assigned to duty" and "ordered to report for duty" have the same meaning and both designate the starting time from which the customs employees are to "remain on duty."

The words "remain on duty" as so used in Section 5 cannot have the effect of creating new conditions to be attached to the grant of additional pay which had not been impaired since 1799. The divesting of any rights then existing should not be permitted by the use of such language.

But those words, even if given the significance suggested by petitioner, could not have any reference to Sunday and holiday duty, but would be restricted to night duty. One comes back to work on Sundays and holidays after having gone home for the night. One does not "remain" on duty in order to work on those days. In the pertinent statute, night duty is placed in the same category with Sunday and holiday duty.

If the Court should hold that respondents are entitled only to Sunday and holiday pay, there will then arise the method of computation of that pay. Under present prac-

---

*Cong. Rec. Vol. 59, part 2, 66th Cong., p. 2171, App. 101.

tices, the nine-hour period between 8 a.m. and 5 p.m. only is credited to Sunday and holiday duty. The hours on Sundays and holidays between 12 midnight and 8 a.m. and between 5 p.m. and midnight are credited to night duty. In this connection, we point out that in H. R. 6577, as introduced by the Treasury Department in 66th Congress, and which subsequently became the new Section 5, that Sunday duty was limited to the period from 8 a.m. to 5 p.m.* However, that limitation was stricken, thus evidencing an intent that the 24 hours of Sundays and holidays should be credited to duty on those days.

Results of Petitioner's Construction

By reading something into the act not expressed therein, petitioner's construction:

1st. Violates the purpose of the legislation which for 121 years prior to 1920 had included in the grant of additional pay the night, Sunday and holiday hours of customs employees for lading or unlading cargo from vessels.

2nd. Strikes down the universal concept that one must not be required to work on a Sunday or a holiday without extra pay.

3rd. Defeats the purpose of the act, which was to raise the pay of customs employees as a class, and who admittedly were much underpaid; and whose financial condition required a substantial raise in pay.

4th. Fails to facilitate lading or unlading at night, but actually tends to detract therefrom by requiring customs employees to give up their night, Sunday and holiday time for that purpose without extra compensation.

---

* *See copy of bill in Hearings, Sub-Committee on Ways and Means, on H. R. 6577, 66th Cong., 1st Sess., p. 3.

5th. Forces upon customs employees the hardship of switching their sleeping hours from one shift to another without extra compensation. Being obliged to work from 12 midnight until 8 a.m., and then to be switched from 8 a.m. to 5 p.m., and then again from 4 p.m. to midnight, disturbs the normal way of life and is not conducive to good health, and prevents proper companionship with family and friends. Such work is entitled to extra pay.

6th. Leads to an unreasonable result, in that the customs inspectors at the seaboard ports receive the increase in pay which Congress provided for all customs employees as a class, while the employees at the frontier ports are denied that increase under the guise of compensating them by lieu days instead of the additional pay granted by Congress.

7th. Leads to an unreasonable and absurd result conflicting with the history and purpose of the act with respect to Sunday service. The statute provides for two days extra pay for being called to Sunday work regardless of the amount of time involved. Under petitioner's construction one working for one-quarter hour on Sunday for a total of 44¼ hours per week, receives the two additional days pay for the ¼ hour of Sunday work, while another, working 8 hours on Sunday for a total of 44 hours per week receives no additional pay.

Results of Respondents' Construction

By giving to the language used its normal meaning, respondents construction leads to the following results:

It facilitates lading and unlading at night and on Sundays and holidays, by providing such a rate of additional pay for the employees which Congress deemed suitable to pay them in order to stimulate their interest in and compensate them for performing the necessary work.

It accomplishes one of the principal purposes of the new Section 5, which was to provide a substantial increase in the then existing grant of additional pay. It accomplishes that purpose without any discrimination between seaboard ports and frontier ports.

It conforms with the universal concept that Sunday and holiday work is to be compensated by extra pay.

It produces results which conform with the history and purposes of prior legislation effective since 1799 affecting the grant of additional pay.

Regarding Amounts Due

The petitioner contends that an unreasonable result is reached under the construction of the act by the Court of Claims, in that the amount of extra pay earned by respondents is unreasonably large. We must take into consideration the fact that these employees come from an intelligent class; that they must maintain a high standard of appearance and be qualified to deal with the public; that the protection of a large volume of the revenue of the United States is placed in their hands under conditions where absolute integrity is necessary; that many of them had received no increase in pay during a period of 56 years and that others had received only an increase of one dollar a day above the rate of 1864.

That the statute was passed in the light of the admitted necessity for a substantial raise in pay for Customs inspectors; that the services for which extra pay was to be given were to be performed for the benefit of private interests and outside of the regular Custom House hours of the port during which free customs service was available, and that the United States was to be reimbursed for the additional pay from the transportation companies re-

ceiving the benefit of such services. Under such circumstances, it is not for the Bureau of Customs nor the Courts to say that the amount of extra compensation to be earned is too much or too little. That is a matter for Congress alone to decide and if the results are not satisfactory, the remedy is in Congress and not in requesting the Courts to resort to judicial legislation to terminate the total extra pay so clearly provided by Congress.

Under the manner in which the act was administered by the Bureau of Customs, it is possible that respondents will receive more than they would have received if the regulations issued by the Bureau of Customs had been complied with, which required assignment to duty at night and on Sundays and holidays to be spread throughout the whole force, so as to equalize the additional pay among all of the employees.

Again, the night, Sunday and holiday traffic at Detroit has multiplied since 1922 because of the tremendous increase in automobile traffic, and also because facilities, such as the Ambassador Bridge and the Detroit and Canada Tunnel, have been added in order to take care of the traffic. This necessitates a large increase in the number of night, Sunday and holiday shifts that are required to be performed in order to protect the revenue. Extra compensation resulting from traffic during 1931 to 1937 under those conditions would necessarily exceed the amount of extra compensation that would have resulted from the traffic in 1922.

Such results arising from change of conditions, or from an unlawful administration of an act, do not fall within the class of "unreasonable results" contemplated to be used as a basis or reason for the necessity of construing statutes. The fault in such cases does not lie in the statute, but in subsequent events not contemplated and

in the unlawful execution of the provisions of the statute, and therefore afford no basis for resort to extrinsic aids in the construction of the statute.

In order to justify resort to construction of statutes there should be something to make plain the intent of Congress that the letter of the statute is not to prevail.[1] Nor is it enough that hard or objectionable consequences result, which were not within the contemplation of the framers of the act. Many laws, when put to the test, produce results very different from those contemplated, but such results constitute no basis for looking beyond the language of the statute.[2]

Also, we suggest the application of the doctrine that in cases involving the pay of Government employees, where the words of the statute admit of two interpretations, the construction ought to be favorable to the claims of the officer who performs the duties. *United States v. Bassett*, 2 Story 389; *United States v. Coltier*, 3 Blatch. 333; *United States v. Morse*, 3 Story 87, Fed. Cases No. 15,820; *Moore v. United States*, 4 c. cls. 141, 165; *Butler v. United States*, 23 c. cls. 162; *United States v. Averill*, 4 Utah 527. But some question is thrown on this doctrine by *United States v. Clough*, 55 Fed. 373. But the decision in the latter case might be distinguished because it involved a fee system which the court stated had been the subject of abuses.

V.

WORKING HOUR PROVISO

With respect to the working hour proviso, so called, with which Section 5 concludes, the construction of that proviso

---

[1] *Treat v. White*, 181 U. S. 264, 268.

[2] *Crooks v. Harrelson*, 282 U. S. 55, 60.

as contended by petitioner, is specifically prohibited by the language of the proviso. That proviso was added to the proposed amendment on the floor in Committee of the Whole at the time of the passage of the act. The amendment was offered by Representative Dupre from Louisiana to eliminate confusion which might arise by the administration of the act at the port of New Orleans.

He pointed out that the services of longshoremen were necessary in connection with lading and unlading and that the Union hours of longshoremen at New Orleans were from 7 a.m. to 4 p.m., and which would create a "hiatus" with respect to the hours from 7 to 8 a.m. and from 4 to 5 p.m. The purpose of the amendment was to permit the collector of a port to be able to conform the Custom House hours of the port, during which free customs service was available, to the hours of employees in other industries whose services might be necessary in the unlading, such as longshoremen.

In the appendix, at p. 94, appear the statements made on the floor in Committee of the Whole at the time the amendment was made and passed, which leave no doubt as to the purpose and scope of the proviso. Mr. Treadway, the manager of the bill for the Treasury Department, clearly stated the purpose of the amendment as follows:

> "Mr. Treadway: As I understand it, it is simply to conform the hours in the lading and unlading of vessels and the Custom House hours at that port."

Never before had Congress ever passed any legislation extending free customs service for the unlading of vessels or conveyances beyond the usual Customs House hours of a port, and there is nothing in this amendment to suggest any possible intention to terminate that practice.

It is also to be noted that Mr. Dupre stated at the time of the offering of the amendment that he was protecting the overtime pay of customs employees by adding a protecting clause to the proviso. That protecting clause is as follows:

> "But nothing contained in this section shall be construed in any manner to affect or alter the length of a working day or the overtime pay herein fixed."

The protecting clause of that proviso is two-fold. One mandate is that:

> "Nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees * * *."

The other mandate of the protecting clause is that:

> "Nothing contained in this proviso shall be construed in any manner to affect or alter * * * the overtime pay herein fixed."

The length of the working day for customs employees which could not be affected or altered by the collector is the nine-hour period during which the Customs House was open for business and no extra compensation could be earned. The collector was prohibited from affecting or depriving the customs employee of the right to earn extra compensation during the remaining fifteen hours of the day.

Likewise, "the overtime pay herein fixed," and which is not to be altered or affected by the collector, is fixed in the enacting clause of the statute as extra compensation to be paid for services performed during Sundays and holidays and a period of fifteen hours on week days, during which free customs service was not available. There is no other overtime pay fixed in the statute so that this phrase "overtime pay fixed" cannot possibly refer to any-

thing else. The collector is thus expressly prohibited from interfering with the rights of customs employees to earn extra compensation by performing services on Sundays and holidays and during a similar fifteen-hour period of week days.

The right vested in the collector is the right to regulate hours of service and he is expressly prohibited from regulating the more important item of extra compensation. In order to permit the collector to interfere with such extra compensation, it is necessary to read into this statute something not expressed therein, but which, on the contrary, is expressly prohibited by the terms of the act. Had Congress intended to permit the collector to assign customs employees to duty at night or on Sundays or holidays without extra compensation, or to require such services to be performed without the special permit required to be obtained by the parties in interest, certainly Congress would have used apt words to that effect instead of language whose normal meaning prohibits such a construction.

The right to regulate the general working conditions of customs employees is vested in the Secretary and not the collector. But neither the Secretary nor the collector have the right to impair the grant of additional pay made by Congress. Giving the authority to the collector, as contended by petitioner, enables him to regulate the additional pay, which Congress already had fixed.

Furthermore, this proviso must now be construed with reference to the paramount provisions of the Tariff Act which specifically defined the words "day" and "night." As so defined they are a guide to the hours during which additional pay is to be earned or not earned, and so the word "day," as used in the proviso, must be limited in its

application to a nine-hour period and the word "night" must be limited to a period of fifteen hours in order to conform with the terms and purposes of the Tariff Act. Any construction by which the word "day" is made to include the twenty-four hours of the day, therefore, conflicts with the paramount provisions of the Tariff Act.

It is further suggested that the phrase "prevailing working hours of a port" could not, under any circumstances, refer to Sunday and holiday hours without some special reference thereto.

Effect of Provisos

We suggest that the mandates of Sections 450 and 451 of the Tariff Act which require a permit and bond for the performance of the night, Sunday and holiday services (not overtime services) raises a presumption that those services are to be compensated by extra compensation. Such presumption appearing in the general enacting portions of the statute should be given full effect and not limited by any subsequent provisions of the act unless the restricting clauses are clear and unambiguous. The effect of the words "overtime services" as used in Section 5 could not exceed that of a proviso. The doctrine today still remains as stated by Justice Story of this Court in *United States v. Dickson*, 15 Pet. U. S. 141, 165, and from which we quote:

> "We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms."

See also:

Lewis Sutherland Stat. Const., 2nd Ed., Volume 2, p. 674.

Meaning as Controlled by the Davidson Case

But the scope of that proviso has been construed in effect by this Court in the Davidson case *(supra)*. That decision controls the sweep of this proviso to the same extent that it controlled the sweep of the extra compensation provisions of the new Section 5. In that case, this Court clearly pointed out that the provisions of the new Section 5 related only to the agencies of transportation described in the first four sections of the act of February 13, 1911 *(supra)*. They related only to vessels and other conveyances carrying cargo and arriving at a port. Therefore, the working hour proviso, being but a part of Section 5, could not relate to the frontier traffic with respect to which the Bureau of Customs has applied its provisions in clear violation of the act.

It is only the rights held under an adopted statute at the time of its adoption which are granted by the adopting statute.[1] Such seems to be the rule established by this Court in cases of adoption by general reference[2] and the same rule should apply in cases of adoption by specific reference.

This construction conforms with the clearly expressed purpose of the proviso, which was to take care of the situa-

---

[1]*Lewis Sutherland Statute Construction*, 3d Ed. Vol. I, p. 393; Id. Vol. II, p. 548 and case cited.

[2]*Kendall v. U. S.*, 12 Pet. (37 U. S.) 524, 526 headnote; *In re Heath*, 144 U. S. 92; *Panama Railroad Company v. Johnson*, 264 U. S. 375, 391, 392.

tion with respect to the longshoremen at the port of New Orleans, whose duties were performed in connection with vessels carrying cargo and making use of that port. As then used it would not apply to the platoon system.

It is not claimed that any regulations were ever published carrying into effect the interpretation of the working hour proviso as contended by petitioner. But if any such regulations had been issued, they would be of no effect under the well established doctrine that any regulation creating a rule out of harmony with the law upon which it is based is a nullity; *Manhattan General Equipment Co. v. Commissioner of Internal Revenue,* 297 U. S. 129 on p. 134; *Miller v. United States,* 294 U. S. 435, pp. 439-40. By the collector's alleged right to regulate "hours" petitioner claims that the collector at Detroit is vested with authority to make a vast number of regulations, partially enumerated as follows:

1. To differentiate between the vehicular ferries and railway car ferries, by relieving the one from the obligation of extra compensation, and requiring the other to pay.

2. To require payment of extra compensation at the passenger station of the Michigan Central Railroad, and to relieve the freight station of the same company from such payment.

3. To eliminate competition between vehicular ferries on the one side, and the Ambassador Bridge, Detroit & Canada Tunnel on the other side. All of whose facilities accomplished the same purpose.

4. To eliminate payment of extra compensation at the freight station of Michigan Central Railway and to require payment at the freight stations of Grand Trunk, Wabash and Pere Marquette Railways.

5. To increase or diminish the additional pay at any or all of the stations at Detroit involved in this suit as he saw fit.

It is perfectly obvious that no such vast powers were intended to be, or were given to the collector under that proviso.

Also under that alleged right, the several Collectors of the United States would be vested with authority to discriminate between different ports of entry of the United States by relieving some ports of the obligations of payment of extra compensation while those provisions were being enforced at other ports. It is perfectly obvious that no such vast powers were intended to be given, or were given, to the collector under that proviso.

If the proviso is construed as petitioner contends, it would be unconstitutional, as an unlawful delegation of authority by Congress as a violation of Article I, Section 1 of the Constitution of the United States, which provides that all legislative power granted to the Federal Government shall be vested in Congress. *Panama Refining Co. v. Ryan*, 293 U. S. 338 on p. 529; *Sutherland v. Miller*, 79 W. Va. 796, at p. 803, 91 S. E. 993, at p. 996; *State v. Larson* (N. J.), 160 Atl. 556, p. 557; *Schecter v. U. S.*, 295 U. S. 405 at p. 541; *Crawford Statutory Construction*, p. 29, Sec. 17; *United States v. Scheveport Grain Co.*, 287 U. S. 77, 82; *U. S. v. Standard Brewery Co.*, 251 U. S. 210, 220; *U. S. v. LaVranca*, 222 U. S. 568.

VI.

PETITIONER'S CLAIM OF SET-OFF

Petitioner claims the right to deduct from respondents' additional pay for night, Sunday and holiday work a sum which would compensate Government for the official hours

not worked by them because of their employment during the night, Sunday and holiday hours for which extra compensation is sought. Such a contention is not justified.

By statute, the pay of customs employees is divided into two distinct items. One is an annual base pay which, in these cases, is $2,100.00. The other is an independent grant of additional pay for work at night and on Sundays and holidays. The two were made independent of each other by Act of March 2, 1799, and each succeeding grant has maintained that distinction.

If the services herein involved had been performed while customs employees were on a per diem basis, payable only for days actually worked in aid of the customs, it might be that they would not have received pay for any day during which they were not called to work. But Congress saw fit to replace that per diem system of compensation with the more modern and just one of an annual salary with suitable opportunity for advancement. The effect was an exchange of the per diem system for an annual salary, but neither affected the grant of additional pay.

Customs employees become entitled to their annual pay by becoming customs employees, assuming the duties of the position, and being available for duty and performing the work required by their superiors in office. When any assignments to duty are for night, Sunday or holiday work in connection with the designated services, they then become entitled to the additional pay provided by statute for night, Sunday and holiday service. In Section 5 the pay is referred to both as extra compensation and as additional pay. Art. 1242(e) 1937 Reg. provides that it shall be in addition to the annual pay.

If the Court should disagree with respondents on the question of set-off, we suggest that in such case, the right

of set-off should be allowed only against night pay, and not Sunday or holiday pay, and that Sunday and holiday pay be credited on the basis of services performed during any of the 24-hour period of those days.

VII.

SPECIAL CONSIDERATION OF STATUS OF AMBASSADOR BRIDGE AND DETROIT AND CANADA TUNNEL

Plaintiffs contend that both the tunnel and the bridge come within the definition of vehicle as defined in the act and that each is a "carriage or other contrivance used, or capable of being used, as a means of transportation on land" and as such the owners or agents of those facilities are required to file a bond as required by Section 451 of the act.

Black's Law Dictionary gives the common definition of a bridge to be "a structure erected over a stream * * * to facilitate the passage thereof." In Volume 4 of R. C. L. at page 193, the following definition appears, "A bridge has been defined to be a structure * * * erected over a river * * * for the more convenient passage of persons and beats and *for the transportation of baggage.*" (Italics ours.)

It is a means of passing from one bank to the other and so becomes a contrivance used as a means of transportation. It is a means used in transporting traffic from one bank to the other. Likewise, the tunnel in this case is a means used for transporting traffic under the stream.

There is no difference between a ferry, a bridge or a tunnel as a means of conveyance of persons, baggage or freight from one side of the river to the other. All accomplish the same purpose. Protection of the revenue

at the bridge and tunnel was just as necessary as at the ferries.

Furthermore, the bond is required from the "master, owner or *agent*" (italics ours) of such vessel or vehicle. When the operators of such bridges and tunnels accept fares from patrons for the use of their facilities, they become agents of such patrons for the purpose of furnishing a means of safe transportation to the opposite shore. They become more than mere licensees. The bridge company assumes an obligation for furnishing a means of safe passage. That liability continues until the patron leaves the bridge.

> "An agency may be defined as a contract either express or implied * * * by which one of the parties confides to the other the management of some business to be transacted * * * on his account * * *." (*2 Amer. Juris.*, Sect. 1, p. 12.)

The relationship is one of principal and agent to the same extent as in the case of the railway company and its passengers. This interpretation conforms to the meaning attached to the word "agent" by Customs Regulations which provide that the "transportation company" file the bond. (Article 1242(a) 1937, App. 81). There can be no question but that the bridge company and tunnel company, respectively, are transportation companies within the meaning of that regulation.

It must be conceded that ferry boats come within the definition of vessels. Petitioner admits the act applies to such boats. Certainly it cannot be contended that Congress ever intended to make railroad companies whose trains cross the border and international ferries liable for this extra compensation, and relieve such facilities as the bridge and tunnel companies from such payment. Such a result

is not only absurd and unreasonable, but it conflicts with the purpose and history of the statute, while respondents' construction conforms with such purposes and history and produces a result which is sensible and practical.

When the Treasury Department, in the 75th Congress, attempted to terminate the liability herein sought to be enforced, under the guise of representing to Congress that one of the provisions of the legislation, there introduced, was to bring such facilities as international bridges and tunnels within the facilities to be affected by additional compensation, it represented to Congress that a toll bridge had been held to be a common carrier, and that, as such common carrier, it would then become subject to the provisions of the act.[1] If the bridge and tunnel companies are common carriers they then certainly come within the definition of those who are required to file a bond.

CONCLUSION

We suggest that the provisions of this statute are clear and that the results of respondents' construction are reasonable and sensible and that to uphold the contentions of petitioner would constitute an exercise of judicial legislation and would require a holding that although Congress had employed plain, positive and easily understood language to express its intention, it had in reality intended something different which it did not express.

Petitioner's unlawful administration of the act has relieved the carriers from the burden of the additional pay and cast that burden upon the customs employees. The intent of Congress that Government be reimbursed can

---

[1]81 Cong. Record 9392, Petitioner's brief p. 144.

still be carried out. In the meantime the employees of Government should have the additional pay so clearly provided by Congress.

For the reasons stated it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

ROBERT M. DRYSDALE,
Attorney for Respondents.

December 14, 1943.

APPENDIX

PERTINENT STATUTORY PROVISIONS

19 U. S. C. 1401, 1450 to 1454. These statutes appear in full in Petitioner's Brief.

Section 401:

> (a) "The word 'vessel' includes every description of watercraft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft."
>
> (b) "The word 'vehicle' includes every description of carriage or other contrivance used or capable of being used as a means of transportation on land, but does not include aircraft."
>
> (f) "The word 'day' means the time from eight o'clock antemeridian to five o'clock postmeridian."
>
> (g) "The word 'night' means the time from five o'clock postmeridian to eight o'clock antemeridian."

Section 450:

> "No merchandise, baggage or passengers arriving in the United States from any foreign port or place, * * * shall be unladen from the carrying vessel or vehicle on Sunday, a holiday or at night, except under special license granted by the Collector * * *."

Section 451:

> "Before any such special license to unlade shall be granted, the master, owner or agent * * * shall be required to give a bond * * * conditioned to indemnify the United States for any loss or

liability which might occur or be occasioned by reason of the granting of such special licence and to pay the compensation and expenses of the customs officers and employees assigned to duty in connection with such unlading at night or on Sunday or a holiday, in accordance with the provisions of Section 5 * * *."

which Section 5 provides (19 U. S. C. 267):

"That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime (*night, Sunday or holiday*) services by inspectors, * * * who may be required to remain on duty between the hours of five o'clock post meridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the unlading * * *, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof, of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days pay for the full period from five o'clock postmeridian to eight o'clock antemeridian) and two additional days pay for Sunday or holiday duty.

"The said extra compensation shall be paid by the master, owner, agent or consignee * * * whenever such special license or permit * * * shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto * * *: Provided, that such extra compensation shall be paid if such officer or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery or examination takes place or not. (Insent in italics ours.)

"Provided further, that in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of

customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed."

PERTINENT CUSTOMS REGULATIONS

The pertinent provisions of the Customs Regulations promulgated in the 1923 and carried forward into 1931 regulations and now appearing in the 1937 Regulations, are as follows:

Overtime Service

"Art. 1242. 'Extra compensation—(a) Customs officers and employees performing services at night, or on Sundays and holidays, for lading or unlading * * * shall receive extra compensation, to be paid by the master, owner or agent of the vessel, or by the transportation company."

"Art. 1245. Sundays and holidays—(a) for authorized services performed on Sundays and holidays between 8:00 A.M. and 5:00 P.M., customs officers and employees shall be entitled to two days pay in addition to their regular compensation."

Hours of Business and Service

Article 1461, Hours of Business—(a) This section specifies the hours during which the Customs House shall remain open for business. The hours specified are from 9:00 A. M. to 4:30 P. M., on all days except Sundays and national holidays, and Saturday afternoons, and which last provision was omitted from the prior regulations.

Article 1462, Official Hours of Service:

(a) "* * *

(b) "The official hours of the following employees will be: * * * inspectors to whatever duty assigned * * *, from 8:00 A.M. to 5:00 P.M., 1 hour for lunch; * * *."

(c) "The above hours may be extended as the needs of the service demand, and such extension shall be without additional compensation, except as provided for in the Act of February 13, 1911, as amended by the Act of February 7, 1920."

(d) "The Act of February 7, 1920, also provides (here follows verbatim the customary working hour proviso so-called at the end of Section 5 *supra* 5)."

Inspectors of Customs

Article 1339 (b):

"* * *

"* * * They are also required to * * *; and perform such other duties as may be assigned to them by their superior officers."

1915 REGULATIONS

Article 1166—Sundays and legal holidays. Sundays and legal holidays will not be charged when they occur within an absence with pay, allowed by law, and which is not on account of sickness, or when they occur at the beginning or ending of any absence.

Sundays and legal holidays occurring within a period of absence on account of sickness, or contagious disease, or within any absence without pay, will be charged.

Article 1167—Record of absence. A record will be kept in each bureau or division of the daily attendance and

hours of arrival and departure and partial-day absences, due to late arrival or early departure, of all officers, clerks, and employees.

When partial-day absences aggregate a day, a day's absence will be charged against annual leave.

The foregoing regulations were carried forward into 1923 regulations as articles 1303 and 1304, respectively.

ACT OF FEBRUARY 13, 1911, ch. 46, 36 Stat. L. 899
SECTIONS 1 to 4 (for Sec. 5 of this Act see p. 88)

An Act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes

"Section 1. That upon arrival at any port in the United States of any vessel or other conveyance from a foreign port or place, either directly or by way of another port in the United States, or upon such arrival from another port in the United States of any vessel or other conveyance belonging to a line designated by the Secretary of the Treasury as a common carrier of bonded merchandise, and, after due report and entry of such vessel in accordance with existing law or due report, under such regulations as the Secretary of the Treasury may prescribe, of the arrival of such other conveyances, the collector of customs, with the concurrence of the naval officer at ports where there is a naval officer, shall grant, upon proper application therefor, a special license to lade or unlade the cargo of any such vessel or other conveyance at night; that is to say, between sunset and sunrise.

Sec. 2. That the master of any vessel from a foreign port or place, upon arrival within a customs collection district of the United States, bound to a port of entry in such district, may make pre-

liminary entry of the vessel by making oath or affirmation to the truth of the statements contained in his original manifest and delivering his said original manifest to the customs officer who shall board such veessel within such district, with a copy of said original manifest for the use of the naval officer at ports where there is a naval officer; whereupon, upon arrival at the wharf or place of discharge, the lading or unlading of the cargo of such vessel may proceed, by both day and night, under such regulations as the Secretary of the Treasury may prescribe.

Sec. 3. That before any such special license to lade or unlade at night shall be granted and before any permit shall be issued for the immediate lading or unlading of any such vessel after preliminary entry, as hereinbefore provided, either by day or by night the master, owner, agent, or consignee of such vessel or other conveyance shall make proper application therefor and shall at the same time execute and deliver to the United States, through the collector of customs, a good and sufficient bond, in a penal sum to be approved by the said collector, conditioned to indemnify and save the United States harmless from any and all losses and liabilities which may occur or be occasioned by reason of the granting of such special license or the issuing or granting of such permit for immediate lading or unlading; or the master, owner, agent, consignee, or probable consignee, as aforesaid, may execute and deliver to the United States, in like manner and form, a good and sufficient bond, in the penal sum of fifty thousand dollars, conditioned to indemnify and save the United States harmless from any and all loses and liabilities which may occur or be occasioned by reason of the granting of such special licenses and the issuing or granting of such permits for immediate lading or unlading by day and night during a period of six months.

Sec. 4. Such application having been duly made and the required bond having been duly executed and delivered, special license or licenses to lade or unlade at night after regular entry of vessels, and due report of other conveyances, may be granted, and a permit or permits may be issued for the immediate lading and unlading, by day and night, of vessels admitted to preliminary entry, or of other conveyances of which due report of arrival has been made: *Provided,* That the provisions of this act shall extend and be applicable to any vessels or other conveyances bound to a port of entry in the United States to be unladen at a port of delivery or to be unladen at a place of discharge designated by the Secretary of the Treasury under the provisions of section twenty-seven hundred and seventy-six of the Revised Statutes as amended: *Provided further,* That when preliminary entry of a vessel shall be made by the master as herein provided he shall not be relieved from making due report and entry of his vessel at the customhouse in accordance with existing law, and any liability of the master or owner of any vessel to the owner or consignee of any merchandise landed from her shall not be affected by the granting of such special license, but such liability shall continue until the merchandise is properly removed from the dock whereon the same may be landed."

PRIOR ENACTMENTS

Pertinent legislation from Act of March 2, 1799, to and including Act of March 13, 1911, effecting requisitioninig by the Government of the unusual hours of customs employees.

Section 50, Act of March 2, 1799 (1 Stat. 665):

"And be it further enacted, that no goods, wares or merchandise, brought in any ship or vessel from

any foreign port or place, shall be unladen or delivered from such ship or vessel, within the United States, but in open day, that is to say, between the rising and setting of the sun, except by special license * * *."

Section 53, Act of March 2, 1799, (1 Stat. 667)

"* * *. And it shall be the duty of the said inspector or inspectors, to attend to the delivery of the cargo or cargoes under their care, at all times when the unlading or delivery of goods, wares and merchandise is lawful, particularly from the rising till the setting of the sun on each day, Sundays and the Fourth day of July in each year excepted; * * *"

Section 54, Act of March 2, 1799, (1 Stat. 668)

"* * *. And it shall also be lawful for the inspectors who may be put on board of any ship or vessel, (and they are hereby required and enjoined so to do) to secure after sunset in each evening, or previous to their quitting the ship or vessel, the hatches and other communications with the hold of such ship or vessel, or any part thereof he or they may judge necessary, with locks or other proper fastenings, which locks or other fastenings shall not be opened, broken, or removed until the morning following, or after the rising of the sun, and in the presence of the inspector or inspectors, by whom the same shall have been so affixed, except by special license from the collector of the port, and naval officer thereof, if any, for that purpose, first had and obtained. * * *"

This statute was amended by Act of March 3, 1873; 17 Stat. 579, R. S. 2871 as follows:

"The collector of customs * * * shall grant, upon proper application therefor, a special license to unlade the cargo of said vessel at night, that is

to say, between sunset and sunrise, but before any such special license is granted, the master, agents, or consignees of the vessel shall execute and deliver to the collector a good and sufficient bond, to be approved by him, conditioned to indemnify and save the collector harmless from any and all losses and liabilities which may occur or be occasioned by reason of the granting of such special license. * * * The collector, under such general regulations as the Secretary of the Treasury may prescribe, shall fix a uniform and reasonable rate of compensation for like service, to be paid by the master, owner or consignee, whenever such special license is granted, and shall collect and distribute the same among the inspectors assigned to superintend the unlading of the cargo."

Act of June 26, 1884 (23 Stat. 59, amending R. S. 2872). Sect. 25.

"When the license to unload between the setting and rising of the sun is granted to a sailing vessel under this section, a fixed, uniform, and reasonable compensation may be allowed to the inspector or inspectors for service between the setting and rising of the sun, under such regulations as the Secretary of the Treasury may prescribe, to be received by the Collector * * * and to be paid by him to the Inspector or Inspectors."

Act of June 30, 1906 (34 Stat. 633, amending R. S. 2871)

"Upon arrival at any port of the United States of a steamship or other conveyance from a foreign port or place, * * * the Collector of Customs, with the concurrence of the Naval Officer, where there is one, upon or after the issuing of a general order, shall grant, upon proper application therefor, a special license to lade or unlade the cargo of said vessel or other conveyance at night—that is to say, between sunset and sunrise; * * * the Collector

under such general regulations as the Secretary of the Treasury may prescribe, shall fix a uniform and reasonable rate of compensation for like service, • • • and shall collect and distribute the same among the inspectors assigned to superintend the lading or unlading of the cargo."

OLD AND NEW SECTIONS 5

Following is Section 5 of Act of February 13, 1911 (36 Stat. 901) and the new Section 5 in Act of February 7, 1920 (41 Stat. 402; U. S. C. (1940), Title 19, Sec. 267) shown together (1st four sections at p. 83).

The phrases omitted from old Section 5 are bracketed and are in small capitals. The new phrases are in *italics*. That part of the section which remained is in ordinary type.

"The Secretary of the Treasury shall fix a reasonable rate of extra compensation for [NIGHT] *overtime* services of inspectors, storekeepers, weighers, and other customs officers and employees *who may be required to remain on duty between the hours of five o'clock post-meridian and eight o'clock ante-meridian, or on Sundays or holidays,* to *perform services* in connection with the lading or unlading of cargo [AT NIGHT], or the lading [AT NIGHT] of cargo or merchandise for transportation in bond or for exportation in bond or for [THE] exportation with benefit of drawback, *or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage* [BUT SUCH RATE OF COMPENSATION SHALL NOT EXCEED AN AMOUNT EQUAL TO DOUBLE THE RATE OF COMPENSATION ALLOWED TO EACH SUCH OFFICER OR EMPLOYEE FOR LIKE SERVICES RENDERED BY DAY], *such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the*

overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. [,] The said extra compensation *shall* [TO] be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: *Provided, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not.* Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent or consignee of such vessel[s]: *Provided further, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.*"

67th CONGRESS—AMENDMENT PROPOSED

Mr. Robillard, representing the International Bridge at Niagara Falls, suggested the following amendments to S. 2188 in 67th Congress. See Hearings S. Comm. on Commerce, S. 1504, S. 1774 and S. 2188, 67th Cong., 2nd Sess., p. 109.

> "The amendments we suggest to Senator Nelson's bill, S. 2188, are, first, after the words 'railroad trains' in line 4, page 4, we suggest adding:
>
> bridges, street railway cars, interurban cars, or ferries and the owners, operators, or agents thereof shall not be required to pay such compensation.
>
> Then we suggest that the following section be added to that bill, S. 2188, following the above amendment:
>
> *And provided further,* That for the performance of customs inspection and collection upon international bridges, and upon and in connection with interurban and street railway cars operated on a regular daily schedule, and ferry boats operated on a regular daily schedule, a sufficient number of customs employees shall be assigned to regular duty so that no such employee shall be required to perform more than six days of service in any week, and services performed in connection with such bridges, cars, and ferries shall not be deemed overtime service, although performed between 5 o'clock postmeridian and 8 o'clock antemeridian, or on Sundays, or holidays."

70th CONGRESS—AMENDMENT PROPOSED

H. R. 12103 in 70th Congress. See Hearing, House Comm. on Ways and Means, 70th Cong., 2nd Sess., Vol. XVI, p. 10275.

"Provided, however, That no inspectors, storekeepers, weighers or other customs officers or employees shall receive extra for overtime compensation for services rendered in connection with traffic by ferries and railroad trains, but the collector of customs shall regulate their hours of work so that no such officer or employee shall be required to remain on duty in any one day, including Sundays and holidays, for a longer period than eight hours, and that the bond required by this section to be given by said railroad companies shall not be condition to pay the compensation and expenses of the customs officers and employees whose services are required in connection with unlading at night or on Sundays and holidays under the provisions of said section 5."

REQUESTED FINDINGS ON EFFECT OF DEFICIENCY APPROPRIATION ACT OF 1936

Exception No. 4

Plaintiff excepts to that part of finding No. 6 on p. 15 reading as follows:

> "During the period for which claims are being made, viz., September 1, 1931, to August 31, 1937, excess pay given to the inspectors has first been collected by the Collector of Customs from the carrier concerned, and by the Collector remitted to the inspectors by check on the fund so collected."

There was a change in the practice, as related in this findings, when the appropriation act of June 22, 1936 (49 Stat. 1636) went into effect. Under that Act, a fund was established for the payment of extra compensation to customs inspectors so that they would not be required to wait until payment was made by the agencies of transportation receiving the benefit of such services. After that time,

payment was made to the customs employees by a Treasury Department check drawn on the fund provided for that purpose under the provisions of that Act.

R. 1, p. 141, 8-53. (Stringer);
R. 1, p. 170, Q. 15 (Petty).

Proposed Special Finding No. 8

From September 1, 1931, until June 30, 1936, when proper regulations were issued under the provisions of the appropriation act of June 22, 1936, the extra compensation paid to inspectors was first collected, by the Collector of Customs, from the agencies of transportation, and by the Collector remitted to the inspectors by checks upon the fund so collected.

Under the Act of June 22, 1936 (49 Stat. 1636) a fund was established for the payment of extra compensation to customs inspectors so that they would not be required to wait until payment was made by the agencies of transportation receiving the benefit of such services.

Thereafter extra compensation was paid to customs inspectors from the treasury of the United States and the inspectors were not required to wait the collection of such extra compensation from the agencies of transportation.

Commissioner Hobbs' Finding No. 6, p. 15, as modified.

R. 1, p. 141, Q. 53 (Stringer).
R. 1, p. 170, Q. 15 (Petty).

H. R. 6738 AS INTRODUCED IN 75th CONGRESS BY THE TREASURY DEPARTMENT

That portion in italics is the proposed amendment

Upon a request made by the owner, master, or person in charge of a vessel or vehicle, or by or on behalf of a common carrier or the owner or consignee of any merchandise, for the services of customs officers or employees at night or on a Sunday or holiday for the performance of which qualified officers or employees on regular duty are not available, the collector shall assign available customs officers or employees in accordance with the request to perform any services which may lawfully be performed by them during regular hours of business, but only if the person requesting such services gives a bond in a penal sum to be fixed by the collector, conditioned to pay the compensation and expenses of such customs officers and employees, who shall be entitled to rates of compensation fixed on the same basis and payable in the same manner and upon the same terms and conditions as in the case of customs officers and employees assigned to duty in connection with lading or unlading at night or on Sunday or a holiday. *If qualified customs officers or employees on regular duty are available to perform the requested services, they shall perform such services without extra compensation.*

REGARDING WORKING HOUR PROVISO

Congressional Record, Vol. 59, Part 2,
66th Congress, Jan. 28, 1940

(Proceedings House of Representatives)

(Pages 2172 and 2173)

"Mr. Dupre: Mr. Chairman, I intend to offer the following amendment, and I might as well discuss it now. I will ask the Clerk to read the amendment.

The Clerk read as follows:

'Amendment offered by Mr. Dupre: Page 3, line 16, strike out the quotation marks, insert a colon and the following:

Provided further, That in those ports where customary working hours are other than those hereinabove mentioned the collector of customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.'

Mr. Dupre: Mr. Chairman, as those who have caught the purport of the amendment will discover, no hostility to the bill is intended by it. On the contrary, I am heartily in favor of the measure, both in its fixing an eight-hour day and in its overtime provisions. The amendment is offered simply to meet the situation that exists in my home city of New Orleans and possibly in other ports of the country. The bill as drawn provides for overtime pay between the hours of 5 o'clock postmeridian and 8 o'clock antemeridian, proceeding on the theory that working hours begin in all ports at 8 o'clock in the morning and end

at 5, with an hour for lunch. It happens that in the city of New Orleans conditions are different, as was set forth in a telegram received by me from the agent of the New Orleans Steamship Association, which will explain exactly what the situation is there. I will ask the Clerk to read the telegram.

The Chairman: Without objection, the Clerk will read the telegram in the time of the gentleman.

The Clerk read as follows:

New Orleans, La., January 27, 1920.

Hon. H. Garland Dupre,
House of Representatives,
Washington, D. C.:

We understand that Senate bill 3418 passed the Senate December 16, has been reported favorably, and this bill fixes the rate of overtime compensation and hours in reference to customhouse officers and employees, etc. The regular day hours of longshoremen at New Orleans are from 7 in the morning to 4 in the afternoon, with meal hour from 12 to 1, while bill in question provides hours of customs employees from 8 in the morning to 5 in the afternoon, so that there will result much confusion and unnnecessary expense. Therefore the New Orleans Steamship Association request that you will use your influence toward having inserted in this bill a clause providing that in those ports or in those industries where the customary hours are from 7 in the morning to 4 in the afternoon authority be vested in the collector of customs to regulate the hours of customs employees to agree with prevailing customary hours in those ports or industries. We would appreciate your giving this matter your earnest attention.

S. T. Demilt.

Mr. Dupre: In accordance with that request and in accordance with the condition that exists in New Orleans, I have offered the amendment, which is entirely permissive. It leaves with the collector of customs the authority to regulate hours of customs employees so as to agree with the prevailing working hours in those ports; but I have safeguarded the eight-hour day which this bill provides for, and I have safeguarded the provision for overtime by adding the words—

> But nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.

I have submitted that amendment to the two majority members of the subcommittee of the Ways and Means Committee who considered the bill, the gentleman from Massachusetts (Mr. Treadway) and the gentleman from Connecticut (Mr. Tilson), and they think the amendment is entirely unobjectionable, saying that the conditions referred to had not been drawn to the attention of the committee.

Gentlemen here will realize what would happen if longshoremen, who have a way of their own about many things, decided to go to work at 7 o'clock and and work until 4, and under the law the customhouse employees, who should work concomitantly with the longshoremen, could not get any overtime pay until between the hours of 5 p.m. and 8 the next morning. There would be a hiatus between 4 o'clock when the longshoremen stopped work and 5 o'clock when the customhouse employees would begin to get their overtime, naturally the latter would not want to work in the interim. The result would be very unfortunate, and this merely allows the collector of customs to say that those two bodies of men, both of whom

are essential to unloading and loading the ship, may be allowed to work at the same time. It is not mandatory in any way, but merely discretionary with the collector. A similar telegram has been received by my colleague Mr. O'Connor, of Louisiana, who is here in the chamber, and who shares with me the views expressed by me both as to this bill and to the amendment proposed."

* * * * *

(Pages 2177 and 2178)

"Mr. Dupre: Mr. Chairman, I offer the amendment which I send to the Clerk's desk.

Mr. Chairman: The gentleman from Louisiana offers an amendment, which the Clerk will report.

The Clerk read as follows:

Amendment offered by Mr. Dupre: Page e, line 10, strike out the quotation marks, insert a semicolon, and the following:

'Provided further, That in those ports where customary working hours are other than those herein above mentioned the collector of customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports; but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.'

Mr. Longworth: I reserve a point of order against the amendment for the purpose of hearing an explanation of it.

Mr. Dupre: Mr. Chairman, this is the identical amendment which I discussed during the general debate at the

request of the gentleman from Massachusetts (Mr. Treadway). I would have preferred to wait until this time, because it requires a renewal of the discussion.

Mr. Longworth: I have looked forward with intense interest to the pleasure of listening to the gentleman.

Mr. Dupre: * * * The bill in question, in providing for overtime pay, fixes the same between 5 o'clock p.m. and 8 o'clock a.m. It happens that in the city of New Orleans the working hours of the longshoremen are from 7 a.m. to 4 p.m., and in order that there shall be no conflict between this bill and the working hours of the laboring men of that city, and possibly in other ports, this proviso simply authorizes the collector of customs to adjust the hours of the customhouse employees with those of the prevailing working hours in that city. In other words, if the men begin their work at 7 o'clock and work until 4, the collector of customs can provide that the overtime shall be from 4 p.m. until 7 the next morning instead of from 5 p.m. until 8 o'clock the next morning. It is entirely permissive. If the collector of customs sees any reason why it should not be done, it is within his authority not to do it, and I have safeguarded absolutely any possibility of lengthening the working day to more than eight hours provided by the bill or interfering with the overtime charge in any way.

Mr. Treadway: As I understand it, it is simply to conform the hours in the lading and unlading of vessels and the customhouse hours at that port.

Mr. Dupre: Entirely; and at other ports, for aught I know. I trust the gentleman from Ohio has enjoyed my explanation of the matter."

REGARDING INTENTION TO INCREASE PAY OF CUSTOMS EMPLOYEES

(Congressional Record continued)

(Page 2171)

"Lading or unlading of vessels at night.

Mr. Treadway: Mr. Speaker, by direction of the Committee on Ways and Means I call up the bill S. 3418.

The Speaker: The gentleman from Massachusetts by direction of the Committee on Ways and Means, calls up a bill, which the Clerk will report.

The Clerk read as follows:

> 'An Act (S. 3418) to amend an act entitled "An act to provide for the lading and unlading of vessels at night, the preliminary entry of vessels, and for other purposes, approved Ferbruary 13, 1911."'

* * * * *

"Mr. Treadway: Mr. Chairman, the bill before the committee, S. 3418, has to do with the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes. It is an amendment of the original act of February 13, 1911. There has been ever since the act went into effect and I think previously to that for the inspectors of customs at customhouses and inspectors of vessels, who have to do with the unlading, a uniform day of 10 hours. This, as you know, is two hours longer than the accepted working day at the present time, and there can be no good reason why the same length of day's work should not be accorded to the men having to do with the customs work as in any other line of governmental employment. Therefore this amendment will reduce the

hours of labor from 10 to 8. *It also puts into effect as law the method of payment for overtime, rather than having the payment for overtime regulated by customs regulations. It establishes as law, in other words, the system for payment of overtime.* It also permits all men who are ordered to report for lading or unlading of vessels to be paid, when ordered to report, for overtime. It seems that through a regulation of the customs department if these inspectors have been ordered to appear for work and for any reason a vessel was not there for them to go to work on they did not receive pay for that time. That seems entirely unfair. It is not the fault of the inspectors that the vessels are not there. It is not a fault of theirs that they are not working rather than waiting to work. Therefore there is this further provision whereby payment will be made to the men if ordered to report for overtime work.

The bill does one other thing. It seems there has been a distinction between payment to men who were employed in unlading cargoes on vessels and those unlading or examining baggage of passengers. There can be no good excuse for that condition other than the fact that no provision of law covered the point, and through a Treasury decision at some time these men who are liable for overtime work in unlading vessels consisting of passengers' baggage and examination of that baggage receive no pay for that work, whereas their colleagues in the same line of work happening to be employed on the freight of the same boat would be paid. I might add that phrases appear in the bill showing that this payment is made by the steamship company reimbursing the Government for the amount paid. *The pay of these inspectors has been very law. The rates of pay are $4, $5 and $6 per day for a 10 hour day.* I think the members of the committee will agree with me that while we retain that same rate of

pay we ought to be willing to pay these men for overtime on a basis of an 8 hour day rather than on the basis of a 10 hour day."

• • • • •

"Mr. Husted: I understood that the customs inspectors were very much underpaid.

Mr. Treadway: I think there is no question about that.

Mr. Husted: I would like to ask the gentleman if he thinks there would be sufficient overtime work to give these men adequate compensation under the provision for overtime in this bill?

Mr. Treadway: I will state to the gentleman that the department, as I am informed, is taking up the rescheduling of all customs employees, and pending that official report to the Secretary of the Treasury, or whoever may be making the investigation, this method is agreeable both to the department and to the men; and I might add, there is sure to be much more overtime on the basis of 8 hours than if the men were working 10 hours.

Mr. Husted: There is, then, a reasonable prospect that by some future legislation the compensation of these men will be increased?"

• • • • •

(Page 2172)

"There has been submitted to a Member of the other branch, who was particularly interested in this bill, an opinion from the collector of the port of New York, where of course the larger number of these men are employed. I wish to read, Mr. Chairman, just a short extract from that letter: I read:

'On behalf of the underpaid customs employees of this port I want to express grateful appreciation of your successful efforts in putting through the Senate bill 3418, which provides, among other things, for compensation for the customs inspectors employed on baggage duty for their services at night and on holidays. This will place them on an equal footing with inspectors who are employed on cargo and who now receive from the steamship companies compensation for night work.'

Then the collector goes on to say that fundamentally he does not believe in the Government being reimbursed for Government work by steamship companies but that has not directly to do with this case. He says further:

'I am sure if you knew as definitely as I know the distressing conditions among the Government's employees in this port, you would realize more fully perhaps why we are grateful to you for this effort in our behalf. When you realize that with the exception of a bonus of $240 per annum to all Federal employees receiving up to and including $2,500, these men are getting practically the same scale of wages given them a quarter of a century ago, you will understand, I am sure, why I have profound admiration for their patience and their patriotism in sticking to their jobs.

As a matter of fact, we are rapidly losing our most efficient men. Resignations are coming to me daily, and the force is now materially reduced beyond where it was prior to the war. The merchants' association and other civic organizations in New York have interested themselves in the situation, and will soon make an appeal to Congress to take some steps in the direction of safeguarding the interests of importers and exporters in this port by way of strengthening the customs machinery here.

> At all angles our Federal employees see a most prodigal display of unprecedented wealth. Meanwhile they are harassed with the consciousness that in many instances at home their children are suffering for the want of proper food and clothing. They know that ours is the richest Government in the history of the world, and they are wondering why they, the servants of this most wealthy Government must go on in poverty.'

The letter is signed by Byron H. Newton, collector. I think that is very strong evidence in behalf of the legislation called for by this bill from a man of experience in the very line of coming in contact with these men who are working for a very meagre stipend, needing to be men of good appearance, gentlemen in their conduct toward the passengers with whom they come in contact, and recognizing that the service must become impaired unless a means can be found, as is furnished by this bill, to increase the pay of the men."

(Page 2173)

"Mr. Benson: Mr. Chairman, the purport of the bill has been called to my attention by a number of men working in Baltimore. I happen to be familiar with the work these men are doing, and this bill meets a much needed reform. At one time these men were allowed to collect extra pay from the shipper, but now under some regulation that is prevented.

They are really the most underpaid for men of their ability and fidelity of men in the Government service."

* * * * *

"Mr. MacCrate: Mr. Chairman, in New York City we have a great many of these men employed in the Customs

Service, and during the war an attempt was made to get them to leave the service. You can understand that men familiar with the shipping business during the war could receive much larger remuneration outside of the service than inside; and yet, notwithstanding the temptation, the greater portion of the customs employees and inspectors stayed and maintained their relationship with the Government.

I know many men, working there nights and Sundays and then having to report early Monday morning, stayed there and performed their duties notwithstanding these tempting offers from outside.

Yesterday something was said by a gentleman in the House that it seemed strange, in view of the complaints as to the low salaries of employees, that they should want to hang on to the Federal pay roll. As a matter of fact, I always give advice to young men and women who seek service on the Federal pay roll not to do it. The best thing they can do is to seek employment outside; but once they get attached to the Federal service it then becomes a question, after leaving that service, where they will get similar employment. I believe the Federal Government is not helped by suggestions that young men and women should leave its service, but we should attempt to give them adequate compensation for the services they render to the Government.

In our own city of New York I know that the letter carriers and postal clerks and other Government employees are receiving much less than the wages paid to unskilled labor. The temptation for men and women in Federal employ to quit the service is much greater than most people realize, and I am certain that members of Congress do not desire to encourage them to do that, but

desire rather to hold efficient employees by adequate compensation. (Applause.)"

(Page 2175)

"Mr. Briggs: Mr. Chairman and gentlemen of the committee, I am very much in favor of the bill pending before the committee. It seems to me that the Government has been waiting rather a long time to grant some relief to these men who have been so patient and faithful for so long without such relief. A great number of these customs employees and other employees covered by this bill are employed and along the dock fronts in the customs service in the great ports throughout this country, and many of them at the ports in my district—the ports of Galveston and of Texas City. Those men work at all times and in all weathers, and they do not complain. They can not stand the burden and pressing costs of the high increase in living without some relief, however. *This bill undertakes to put into force and effect by law* regulations that the Government, through the Treasury Department, has already sought to establish almost to the same degree. The bill carries a little greater compensation, as I understand it, than now obtained, compensation that is absolutely needed.

* * * * *

(Page 2176)

"Mr. Tilson: It seemed to the subcommittee that, taking the regulations which have prevailed for many years, and taking the very low compensation which these men receive per day, the schedule as fixed in this bill is not more than fair for them."

(Page 2177)

"Mr. Goldfogle: Mr. Chairman, I rise to express my hearty approval of this measure. The force of customs inspectors and other customs officers covered by this bill have been and are, in my opinion, much underpaid. They render faithful and arduous service. During the winter months their work is particularly exacting and hard. They are an intelligent set of officials, and were they to turn to other avenues of employment outside Government work and do it with the same zeal, earnestness, fidelity, and efficiency as they do in the Customs Service, a private employer with due regard to his own interest would give them a large increase over what their official salaries are. They are necessarily required in wind and weather, and in storm and often amid great difficulties, to perform their service, and they have performed it well, and I am glad that at least something has been done toward helping this very deserving class of Government employees. In the light of living conditions, the ever-increasing cost of living, the inability of these men, especially in the large cities, to get along with the meager pay they are receiving, and so that they may properly and decently provide for thmselves and their families, it is but meet and proper that the Government should properly provide suitable compensation. Even this bill fails to give those men what they in justice and fairness ought to get. This however, is a step in the right direction, and I am glad to support the bill.

Mr. Pell: Mr. Chairman, no one who has ever returned to the United States can have failed to notice the courteous and efficient treatment that he has received from the customs officials. I have come through several American customhouses myself and have been impressed every time with the thoroughness, the politeness, and the sense of

duty displayed by these men. Of course, there have been complaints, but my own observation is that in every case the complainant is a would-be smuggler.

These men belong to a particularly hard-used class. They must have a certain education and must keep up a certain amount of appearances. They are like all people on small, fixed incomes, being crushed between the devil and the deep sea. We should, I think, do what we can to relieve their case.

• • • • •